Supreme Court, U.S.
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No. ___

In the
SUPREME COURT OF THE UNITED STATES

BEVERLY HACEESA, Individually, and FIRST FINANCIAL TRUST COMPANY, as Conservator for SHENOEL HACEESA, A Minor, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Turner W. Branch,
Counsel of Record
2025 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
(505) 243-3500
Counsel for Petitioners

Of Counsel:
James P. Lyle
1116 2nd Street, NW
Albuquerque, NM 87102
(505) 843-8000

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QUESTIONS PRESENTED

1. Is the United States entitled to the benefits of every state medical malpractice cap regardless of whether it is in "like circumstances" with those private individuals who are entitled to the benefits, and subject to the burdens, of the forum state's malpractice laws?

2. Do principles of fundamental fairness prohibit a Circuit Court from raising (and deciding) a complex and novel issue of state common law, *sua sponte*, without providing an opportunity for the litigants to address the issue decided?

3. Does a Federal Tort Claims Act complaint relate back to an earlier-filed complaint that contains identical allegations of fault, brought by the same parties to explicitly add claims for damages that are implicit in the original complaint?

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IN THE
SUPREME COURT OF THE UNITED STATES

BEVERLY HACEESA, Individually and As Personal Representative of the ESTATE OF HARDY HACEESA and FIRST FINANCIAL TRUST CO., as Conservator for SHENOEL HACEESA, a minor,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Beverly Haceesa, Individually and As Personal Representative Of The Estate of Hardy Haceesa and First Financial Trust Co., as Conservator for Shenoel Haceesa, a minor, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (App., *infra* 1.1) was entered on October 24, 2002 and is reported at 309 F.3d 722. The Amended Findings

of Facts and Conclusions of Law of the District Court were entered June 21, 2001 and are not reported (App., *infra* 1.40).

JURISDICTION

The Order denying Petition For Rehearing and Rehearing *En Banc* was entered November 26, 2002 and is not reported as of this writing. (App., *infra* 1.53). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1346(b) (App., *infra* 1.54)
28 U.S.C. §2401(b) (App., *infra* 1.54)
28 U.S.C. §2674 (App., *infra* 1.54)
28 U.S.C. §2675(a) (App., *infra* 1.55)

N.M. Stat. §41-5-3 (App., *infra* 1.56)
N.M. Stat. §41-5-5 (App., *infra* 1.57)
N.M. Stat. §41-5-6 (App., *infra* 1.58)
N.M. Stat. §41-5-7 (App., *infra* 1.59)
N.M. Stat. §41-5-14 (App., *infra* 1.61)
N.M. Stat. §41-5-15 (App., *infra* 1.61)
N.M. Stat. §41-5-19 (App., *infra* 1.62)
N.M. Stat. §41-5-23 (App., *infra* 1.63)

STATEMENT OF THE CASE

A. General Background and Description.

This is a medical malpractice case brought against the United States for the death of Hardy Haceesa, a

twenty three year old Navajo man, from hanta virus on April 28, 1998. Petitioners brought suit in the United States District Court for the District of New Mexico under the jurisdiction of 28 U.S.C. §1346.

On the evening of Saturday, April 25, 1998, twenty-five year-old Hardy Haceesa came to the Indian Health Service hospital emergency room in Shiprock New Mexico, complaining of a fever, difficult and painful breathing, chest discomfort, and general achiness. He and his wife Beverly told the nurse his condition could be the result of exposure to mice. The nurse had no knowledge of the significance of Hardy Haceesa's condition and mice exposure. She told Hardy he had bronchitis and sent him home with instructions to check back at a local clinic on Monday. By Tuesday evening, he was dead.

Hardy died of hanta virus pulmonary syndrome, a disease caused by exposure to airborne particles of the urine of infected mice. Patients suffering from the early stages show flu-like symptoms. In the late stages of the disease fluids collect in the lungs. Untreated victims slowly drown on their own fluids. Hardy's disease was not diagnosed until hours before his death on April 28, 1998 at private hospital (which had also negligently misdiagnosed his disease the day before).

The nurse in question was employed by Northern New Mexico Navajo Hospital in Shiprock, New Mexico (NNMNH). This facility is owned and operated by the Indian Health Service, an agency of the United States Department of Health and Human Services. As the district court observed, NNMNH stands "in the

geographic center of the world for" hantavirus.

On June 21, 2001, district court found that Hardy's death from this disease was attributable to the negligence of the nurse at NNMNH. The district court also concluded that the NNMNH administration had negligently failed to educate the nurse in how to recognize a person who was in the early stages of the disease. (App., *infra* 1.50). The United States did not appeal from the finding of negligence.

The total damages awarded to the family resulting from Hardy's death were $3,307,720.73. New Mexico has recently adopted a pure "loss of chance" approach to these types of cases. Accordingly, the damages were reduced by 35 percent because Hardy had a 65 percent chance of surviving the disease at the time of the negligent acts in question. The district court also found that the negligence of the United States was successive, and not concurrent with, any negligence of a private facility where he was seen, and misdiagnosed, two and three days later.

Prior to suit, the United States had attempted to dismiss the claims brought on behalf of Hardy's Estate, claiming that only the claims brought by Hardy's wife and on behalf of his infant daughter were timely under the Federal Tort Claims Act. The district court twice rejected these arguments, first on March 6, 2000, and again on April 20, 2000 (App., *infra*, 1.27, 1.34). Two administrative claims were filed under 28 U.S.C. §2401. (App., *infra*, 1.64, 1.68). The first was filed on July 2, 1998. At this time, Beverly Haceesa had not yet been name personal representative of her husband's Estate. On

October 16, 1998, a second administrative claim was filed after the appointment of Beverly as Hardy's personal representative. Both claims were essentially identical in the notice provided to the United States regarding the basis of the claims and the underlying facts.

The original complaint was filed on January 15, 1999. (App. *infra.* 1.76) It referred to all acts that led to the death of Hardy Haceesa. On April 22, 1999, the United States attorney handling the case was told the Plaintiffs wished to amend to add the damage claims of the Estate of Hardy Haceesa. On October 6, 1999, the U.S. Attorney handling the case said she would agree to the proposed amendment, but objected to amendment by interlineation. This attorney repeatedly promised to send authority supporting her objection. The authority was never sent. Rather, the United States decided to oppose the amendment and filed the motions to dismiss referenced above.

After losing at trial, the United States appealed to the court below claiming: (1) any recovery against it was limited to $600,000 under the State of New Mexico's malpractice act; (2) it should have been considered to be a concurrent tortfeasor with those who misdiagnosed Hardy's condition two and three days later; and (3) the administrative claim of the Estate was not timely.

The Court of Appeals for the Tenth Circuit reversed on October 24, 2002. (App., *infra* 1.1). It first found that the United States was entitled to the benefit of the $600,000 damages cap available to some private health care providers in New Mexico. It rejected the claim that the United States was a concurrent tortfeasor,

but then raised, *sua sponte*, a novel issue of state law regarding proper calculation of subsequent tortfeasor liability in a loss-of-chance case. The court's view of how this new issue should be decided was used to reduce the liability of United States from 65% to 10% of the total damages.[1] Finally, the opinion below found that the amended complaint adding the claims brought by Beverly on behalf of the Estate was not timely, rejecting without comment all Circuit Court opinions to the contrary.

B. Medical Malpractice Liability In The States of the Union.

At least fifteen States, including New Mexico, have enacted some form of cap limitations on medical malpractice verdicts. Of these, Florida, Indiana, Louisiana, Nebraska and New Mexico have enacted statutes that do not apply to all healthcare providers or hospitals sued for medical malpractice, but rather apply only to those healthcare providers who elect to participate in a comprehensive scheme of statutory regulation and who qualify to participate. *See*, Fla. Stat. §766.105; Ind. Code Ann. §34-18-3; La. Rev. Stat. Ann. §40.1299.41; Neb. Rev. Stat. § 44-2801; N.M. Stat. §41-5-6. Private hospitals sued for medical negligence in New Mexico face potentially unlimited liability. New Mexico appellate decisions show that few private hospitals "qualify" under the NMMMA, and thereby receive the

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It must be stressed that these issues, raised and decided in Part II, of the opinion below were not raised, briefed or argued by any party prior to the time the opinion was issued.

benefit of its $600,000 cap.

All of these statutory schemes carry with them certain burdens and benefits. Healthcare providers who chose not to qualify under these state laws, for whatever reason, are free of the obligations imposed by these laws, and are likewise precluded from accepting the benefits of these laws. *See, e.g.,* Ind. Code Ann. § 34-18-2-24.5 (defining "Qualified Provider"). While Congress is currently debating the proposal to federalize medical malpractice cap limitations, in most States today, there are no caps on these recoveries.

Coverage sometimes varies from state to state depending on the type of health care provider being sued. For example, in some states claims against nurses and hospital administrators are not included. *See, e.g.,* Fla. Stat. §766.105(1)(b); N.M. Stat. §41-5- 3(A). In these states some private persons sued for medical negligence are entitled to the protection of the state's malpractice caps, and some are not.

REASONS FOR GRANTING THE PETITION

The opinion below awards the protections of the New Mexico Medical Malpractice Act ("NMMMA") to the United States in circumstances where a private person, sued for the same conduct, could not receive this protection. As the Tenth Circuit acknowledged (App., *infra* 1.11), its decision conflicts with *Knowles v. United States,* 91 F.3d 1147, 1150 (8th Cir. 1996). The court's opinion cannot be reconciled with another circuit court opinion, *Lozada v. United States,* 974 F.2d 986 (8th Cir. 1992), and its own prior decision in *Hill v. United States,*

81 F.3d 118 (10th Cir. 1996), because the opinion below pretends that the United States meets, or is willing to meet, **all** of the objectives of the NMMMA.

When sued in tort, the United States is liable "to the same extent as a private individual in like circumstances". 28 U.S.C. §2674. In those states where private individuals sued for the same conduct are not included within the medical malpractice cap's definitions, cap protection can only extend to the United States by creating a "a rough equivalent to a state statute when they are clearly ineligible for the precise remedy provided therein." *Hill,* 81 F3d at 121. *See also,* 28 U.S.C. §1346(b) (establishing Tort Claims Act jurisdiction in the district courts when "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.").

Citing *Carter v. United States,* 982 F.2d 1141, 1143-44 (7th Cir. 1992), *Lozada,* and *Owen v. United States,* 935 F.2d 734, 737-38 (5th Cir. 1991), the opinion below perpetrates the mistaken belief held by some circuits, that because "the financial responsibility of the United States is assured..., its failure to contribute to a compensation fund is immaterial because (unlike qualified providers) it must pay its liabilities without resort to the compensation fund." (App., *infra* 1.6). The belief that all state malpractice acts have the sole purpose of guaranteeing the financial responsibility of the negligent entity, cries out for correction by this Court.

At the very least, the Tenth Circuit had an obligation to find that the United States, having raised its

entitlement to cap protection as an affirmative defense, had the burden of proving that most private hospital administrators and nurses sued in New Mexico were entitled to cap protection. Under 28 U.S.C. §2674, the United States may assert a defense based upon legislative immunity "which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim...." Instead, the court went to the extraordinary step of placing this burden of proof on the Petitioners.

In like fashion, the court below decided to raise and decide a novel issue of state common law without providing the parties any opportunity to prepare for and argue the issue. In doing so, the court shattered the fundamental principles of fairness to litigants which this Court has long recognized to be the "touchstone of due process". *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). It is a well established principal that a court of appeals should refrain from raising from raising an issue not raised in the trial court if it presents a question of law that requires further factual development and which causes manifest injustice by its resolution. *United States v. Strahl*, 958 F.2d 980, 983 (10th Cir. 1992).

The Petitioners' amended complaint added only two (2) elements of damage to the original: (1) pain and suffering and emotional distress suffered by Hardy Haceesa before his death, and; (2) loss of enjoyment of life to Hardy Haceesa. Leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The amendment avoided the forfeiture of just claims brought by the statutory beneficiaries of which the United States had notice. Although neither of

the Petitioners were the personal representatives of the decedent, when the first administrative claims were filed, these administrative claims were more than adequate to put the United States on notice so that it could adequately investigate the claims. The decision below conflicts with the opinion of the Sixth Circuit in *Knapp v. United States,* 844 F.2d 376, 379 (6th Cir. 1988).

The decision below also conflicts with the opinion in *Kelly v. United States,* 568 F.2d 259 (2nd Cir.), *cert. denied* 489 U.S. 830 (1978) and *Murray v. United States,* 73 F.3d 1448 (7th Cir. 1996). These conflicts are significant. In *Kelly,* the United States was told it could not lull parties into believing that they had complied with administrative requirements under the Federal Tort Claims Act, and then attempt to use technical defects or alleged failures to meet administrative prerequisites to defeat valid claims. In *Murray,* the United States was told that it could not pretend ignorance regarding the true nature of the claims that had been presented to it when all information regarding the essential nature of those claims was contained in a timely filed notice. The opinion below encourages government counsel throughout the Union to use similar tactics in attempting to defeat meritorious claims.

I. The United States Is In "Like Circumstances" With Private Healthcare Providers Who Are Not Covered By Comprehensive Statutory Malpractice Laws In Certain States

The opinion below overlooks the burden imposed on private health care providers who qualify under the NMMMA with respect to payment of future medical

care. This is a key objective of the NMMMA, for which no equivalent exists with respect to the United States. Thus, the opinion conflicts with other circuit court opinions, such as *Lozada v. United States,* 982 F2d 1141 (8th Cir. 1992), and conflicts with the Tenth Circuit's opinion in *Hill v. United States,* 81 F3d 118 (10th Cir. 1996).

Lozada v. United States, 974 F.2d 986 (8th Cir. 1992), found that the federal government was in "like circumstances" with health care providers who chose to participate in the Neb. Statutory scheme because "the federal government is willing to meet the objectives of the Nebraska Act...". *Id.* at 989. It is here that the opinion below perpetrates an unfortunate misconception held by some of the Circuit Courts. One key objective of the NMMMA is the mandatory screening process before a neutral fact-finding panel. N.M. Stat. §41-5-15. The original purpose the this process was "to prevent where possible the filing in Court of actions against physicians and their employees for professional malpractice in situations where the facts do not permit at least a reasonable inference thereof; and, ... to make possible the fair and equitable disposition of such claims against physicians as are, or reasonably may be, well founded (by providing an expert witness)." *Rupp v. Hurley,* 41 P.3d 914, 919 (Ct. App. NM 2001).

Another key objective of the NMMMA is the guarantee that survivors of medical negligence will always receive the medical care they require even if their medical needs change after their case is tried. After the trial, all "[p]ayment for medical care and related benefits shall be made as expenses are incurred." N.M. Stat. §41-5-7(D). Additionally, the trial court retains

continuing jurisdiction over these payments. N.M. Stat. §41-5-9. If at any time the patient's medical needs increase during their lifetime, the patient can petition the court for an increase in their benefits.

Thus, the injured patient is assured that their medical needs will always be met, even if these needs change in a way that is not foreseeable at the time of trial. Under the reasoning used by those Circuit Courts which ignore the "like circumstances" mandate of 28 U.S.C. §2674, and the reasoning of *Lazoda*, Federal Tort Claims Act cases that require future medical care payments present a dilemma - will such future medical payments be included as part of the judgment? If so, the injured patient loses her right to seek an increase in medical benefits if her needs increase, contrary to the provisions of the NMMMA. If not, should the court create a kind of trust for such payments, retaining continuing jurisdiction over the trust as long at the patient lives? There is no statutory or case law authority that would authorize such action. *Hill v. United States*, 81 F.3d 118 (10th Cir. 1996), indicates that this is not permissible. If, as noted by *Hill*, "the United States may [not] attempt to create a rough equivalent to a state statute when they are clearly ineligible for the precise remedy provided therein", then certainly the courts are likewise prohibited from doing so to suit the needs of any particular case. *Hill*, 81 F3d at 121.

Carter v. United States, 982 F2d 1141 (7th Cir. 1992), cited by the opinion below, highlights the lack of attention given to this issue in the face of the "like circumstances" mandate of the Federal Tort Claims Act. *Carter* provides no independent legal or policy analysis

in support of its assumption that the United States is more closely akin to the private provider who has elected to participate in the statutory scheme, than those who have not. As noted by the *Carter* dissent: "It is indeed a stretch of logic to hold that the United States is more like the medical provider who pays a surcharge premium and qualifies for the malpractice cap under Indiana law than the private provider who does not do so." *Carter*, 982 F.2d at 1145-46, n.1 (Lay, Senior Circuit Judge, dissenting).

This is exactly the case here. The United States asserted the applicability of the NMMMA cap as an affirmative defense. It was government's burden to prove that it is in "circumstances most like" those private individuals who have elected coverage under the Act.[2] *See, e.g.,Harrison v. Thompson*, 447 F.2d 459, 460 (5th Cir. 1971) ("The statute of limitations [is] an affirmative defense. The burden of proof was therefore on [the defendant] to plead such defense affirmatively and to establish it by proof."). The United States did not even attempt to meet its factual burden on this issue. Rather, the court below criticized the Petitioners for failing to rebut what it apparently accepted as a presumption in favor of the government on this issue.

Hill notes that *Lozada, Carter,* and the other Circuit decisions that have allowed the United States to acquire

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[2] The opinion notes that the "record before us it totally inadequate even to establish the Plaintiff's factual premise", as to whether the majority of private hospitals in New Mexico have elected to qualify under the NMMMA. (App., *infra*, 1.7) (emphasis added).

the protection of other states' medical malpractice caps place "the tort victim in exactly the same position that would have resulted had the victim been injured by any other similarly-situated private party." *Id.* (emphasis added). The decision below falls far short of placing future New Mexico victims of federal medical malpractice in exactly the same position as persons injured by providers who qualify under the NMMMA. Such victims will never have their cases screened by an independent fact-finding panel. They will never be provided with a local medical expert to assist in the prosecution of their case. They will never be assured that if their medical needs increase after trial, that the payments they receive will be increased under the guidance of a court which retains continuing jurisdiction throughout their lifetime. "Like circumstances" can only be achieved in New Mexico and those states with similar statutory schemes by accepting the simple fact that the United States is most akin to those health care providers who fall outside the burden and benefits of the NMMMA.

II. The Vicarious Liability Of The United States For The Negligence Of Its Employees Is The Same As The Liability The Individual Employees Would Face If They Were Sued In The Forum Jurisdiction

The opinion below perpetrates a belief that the United States, regardless of where it is sued, need not prove that a private individual sued for the same conduct would be entitled to the forum state's cap protection. This holding violates the express language of 28 U.S.C. §2674 by allowing the government to assert a claim of legislative immunity for any award over the cap without

proof that the cap would be available to "the employee of the United States whose act or omission gave rise to the claim...." The United States never attempted to prove that New Mexico hospitals are protected by the NMMMA when sued in *respondeat superior* for the negligence of employees who are not qualified under the Act. As such, the opinion conflicts with the only other reported Circuit opinion that squarely addresses this issue, *Knowles v. United States*, 91 F3d 1147 (8th Cir. 1996).

The opinion did correctly admit that the *respondeat superior* liability of the United States under the FTCA is limited to that of a private employer under like circumstances. The record is devoid of any attempt by the United States to meet its burden on this factual issue. This is especially troubling in light of the fact that the only reported New Mexico cases involving hospitals sued for the negligence of employees who are not qualified providers show that the defenses of the NMMMA are not available the hospitals. *See, Roberts v. Southwest Community Health Servs.*, 837 P.2d 442, 443 (NM 1992); *Diaz v. Feil*, 881 P.2d 745, 750 (NM Ct. App. 1994) (claims against hospital for negligently failing to ensure proper care was rendered upheld after filing of complaint - no Medical Review Commission proceedings were recorded); *Lopez v. Southwest Community Health Servs.*, 833 P.2d 1183, 1185 (NM Ct. App.), *cert. denied*, 831 P.2d 989 (NM 1992)(award of $2.25 million dollars upheld against hospital that was found 30% liable); *Grantland v. Lea Regional Hospital, Inc.*, 796 P.2d 599, 601 (NM 1990) (concluding tolling statute should be applied equally to claims against defendant hospital, which was a non-qualified health care provider); *Otero v. Zouhar*, 697 P.2d 493, 499 (NM Ct. App. 1984)("hospital was also

named as a defendant and it was not a qualified health care provider").

The opinion below finds that the Eight Circuit's holding in *Knowles v. United States*, 91 F.3d 1147 (8th Cir. 1996), is in disagreement with other Circuit cases. App., *infra*, 1.10). The salient holding of *Knowles* is: "If an employee would not have had the benefit of a particular defense, a damages cap for example, neither does the United States." *Knowles*, 91 F.3d at 1150. *St. John v. United States*, 240 F.3d 671 (8th Cir. 2001), does not reach a different conclusion. *St. John*'s discussion of *respondeat superior* liability under the Federal Tort Claims Act was limited to determining whether a Bureau of Indian Affairs police officer was acting within the scope of his employment when he sexually assaulted his former spouse - and whether this determination should be made as a matter of federal or state law. *Id.* at 675-78.

Johnson v. Sawyer, 47 F.3d 716 (5th Cir. 1995), is cited below for the proposition that "[a]ll FTCA liability is *respondeat superior* liability." While this is an accurate quote, this part of the opinion gives no hint that the Fifth Circuit believes that the United States is entitled to assert defenses that would not be available to private employees, even in *respondeat superior* suits against their employers. In fact, the paragraph cited concludes by noting that "*[r]espondeat superior* does not impose liability on the employer unless the employee's conduct has been actionable." *Johnson*, 47 F.3d at 730. *Johnson* does not indicate that the United States may claim the benefit of a state law defense which is not available to a private employer sued in *respondeat superior* for the same conduct.

In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), the core issue was whether a certification by the United States Attorney General that a drunk federal employee was acting within the scope of his employment was reviewable (and reversible) by the Federal Courts. In reversing the certification, the Court made the following observation about governmental tort liability: "In such a case, the United States, by certifying [that the employee is acting within the scope of his employment], is acting against its financial interest, **exposing itself to liability as would any other employer at common law** who admits that an employee acted within the scope of his employment." *Lamagno*, 515 U.S. at 427 (emphasis added).

No holding of this Court, and nothing in the language of the Federal Tort Claims Act, permits the United States, sued in *respondeat superior* as it must be, to assert an affirmative defense which would not be available to the individual employee. No New Mexico hospital sued for the negligence of its nurses or administrators has ever been granted the protection of the NMMMA. The government's claim of entitlement to the protection of **any** state's medical malpractice cap is an affirmative defense - and the United States should have the burden of establishing its entitlement to the protections of this defense. That the Seventh and Tenth Circuits seem to accept an unprecedented burden-shifting to the victims of medical malpractice is, perhaps, the most disturbing result of the opinion below.

III. The Tenth Circuit's Decision To Raise And Resolve A Novel And Complex "Surprise" Issue Was Fundamentally Unfair

This Court has long recognized that there are principles "of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts* 291 U.S. 97, 105 (1934). Even in commercial litigation, where the rights involved do not concern life or liberty, the right to a full hearing is within the protection of the due process clause of the Fourteenth Amendment. "[M]anifestly there is no hearing when the party does not know what evidence is offered or considered." *Interstate Commerce Comm'n v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1912).

Fundamental fairness to litigants has been repeatedly invoked by this Court's decisions, most recently in *State of Arizona v. State of California*, 530 U.S. 392 (2000). In *State of Arizona*, it was argued that the Court should decide a preclusion defense, *sua sponte*, that had never been raised by the litigants. The proponents of this argument suggested that the district courts were free to resolve such issues *sua sponte*, therefore, the issue was proper for the Court to raise and resolve. The argument was rejected because none of the parties had been given any notice that the issue might be considered. In doing so, the Court issued a clear warning against such conduct by the judiciary: "Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication." *State of Arizona*, 530 U.S. at 412-13.

The only issue raised by the United States regarding the portion of its tort liability was that it was a concurrent tortfeasor with the hospital that negligently misdiagnosed Hardy's condition two and three days later. Petitioners argued that the United States was the first of two successive tortfeasors. Under New Mexico, and in particular *Lujan v. Healthsouth Rehabilitation Corp.*, 902 P.2d 1025, 1029-30 (N.M. 1995), and *Lewis v. Samson*, 992 P.2d 282, 293 (N.M. Ct. App. 1999), successive tortfeasors are liable for the entire enhancement of an injury if proximately caused by their negligence.

In this loss of chance case, New Mexico law holds the United States responsible for the entirety of the harm caused by its negligent failure to diagnose and treat Hardy's disease: "A party is liable for negligence resulting in another's lost chance for [a better outcome to] [survival from] **a preexisting condition**. This lost opportunity is an injury in itself." N.M. Rules Ann. 1986, 13-1635 (Uniform Jury Instruction on "Loss of Chance") (emphasis added).

With proper treatment Hardy Haceesa had a 65% chance of surviving his preexisting condition. There are only two groups of potential wrongdoers who are responsible for the loss of this opportunity, - those who saw him at NNMNH on April 25, 1998, and those at the facility where he was seen 2 and 3 days later. The first lost chance (injury) was subsequent to the second.

Thus, once the court below rejected the government's argument that it was a concurrent tortfeasor, it had decided the common law issues presented in the appeal in favor of the Petitioners. It was

here that the opinion below ventured into uncharted waters. It decided, *sua sponte*, that there was a "remaining question" - "whether the Government is responsible for all of the plaintiffs' damages..." (App., *infra*, 1.15). The opinion then concluded that the United States was not the first of the successive tortfeasors. Rather, "Haceesa's initial injury was not caused by the Government, but rather by hantavirus." Stated another way, the opinion below treats the disease as a tortfeasor, rather than a pre-existing condition.

There were no prior tortfeasors. There was only a pre-existing condition. The Respondent's negligence resulted "in another's lost chance for survival from a preexisting condition." None of the parties below argued that if the United States was a successive tortfeasor it could somehow escape the effect of *Lewis'* holding regarding the joint and several liability of the original tortfeasor for the entire harm. No argument was ever raised that the hantavirus, or the mice that spread it, or an unidentified employer was the "original tortfeasor". These issues were conceived, and then resolved, solely by the court below without notice or an opportunity for the parties to be heard. Thus, the court below violated the principle of fundamental fairness to litigants, which is " the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

The resolution reached required that the court below make factual assumptions, some of them extreme, because there had been no opportunity for adequate factual development in the record. Normally, a circuit court may consider a new issue like this only if it presents a question of law that does not require further

development of the record, and if consideration is necessary to prevent manifest injustice. *See, United States v. Strahl*, 958 F.2d 980, 983 (10th Cir. 1992). Petitioners suggest that a finding that the disease, the mice that spread it, or some other "hypothetical defendant" (App., *infra*, 1.25, n. 7.) was the original tortfeasor is one which is not rationally supported by the factual record, and which does not fit within legitimate goal of preventing manifest injustice. The manner in which this was done was, at least, fundamentally unfair to Petitioners, and, at most, a Due Process violation.

IV. Relation Back Of The Minimal Amendments To The Original Complaint Serves The Interest of Justice And Does Not Violate Any Of The Purposes Underlying The Federal Tort Claims Act

Tort claims against the United States are forever barred unless an action is "begun within six months after the date of mailing...of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. §2401(b). In construing this provision, courts must not defeat its purpose of encouraging prompt presentation of claims against the federal government. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

This wrongful death action was begun within six months after the United States issued a final denial to the Petitioners. The amendment allowed by the district court did not add new parties, nor claims to the wrongful death action. As explained in part *E, infra,* the administrative claim forms first submitted fully apprised the United States regarding the true nature of the wrongful death action it was facing. In New Mexico, a

wrongful death action is brought by the personal representative on behalf of the estate of the decedent and for the benefit of those entitled to the proceeds of the action. *See,* N.M. Stat. §41-2-3. Thus, the government had everything required by the Federal Tort Claims Act - timely notice of the claims and the commencement of the action within six months from the denial of those claims.

Leave to amend a complaint is to be "freely given when justice so requires." Fed. R. Civ. P. 15(a). The belief held by the court below was apparently that the amendments could not relate back to the original complaint because the original complaint was filed on January 15, 1999, less than six months after the administrative claim was filed specifically on behalf of the estate of Hardy Haceesa on October 30, 1998, and before final denial of the estate's administrative claim in April, 1999. This belief cannot be squared against either the language of the Federal Tort Claims Act or other lower court decisions.

28 U.S.C. §2675(a) sets forth two essential requirements for presentation of a claim to a federal agency: (1) a written statement that sufficiently describes to injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim. The administrative claims submitted on January 15, 1999 provided the United States with both of these elements. The opinion below conflicts with other lower court decisions and a decision of the Sixth Circuit by refusing to allow the relation back of the damage claim amendments made after the Petitioners were entitled to assert these claims as personal representatives of the estate. *See, Knapp v. United States,* 844 F.2d 376, 380 (6th

Cir. 1988)(failure of a widow to file an administrative claim as personal representative of the estate of her husband did not affect the jurisdiction of the district court because the widow was qualified as personal representative when the action was filed in the district court); *VanFossen v. United States,* 430 F. Supp. 1017, 1021 (N.D. Cal. 1977)(statutory beneficiary was the proper person to file an administrative claim before filing a Federal Tort Claims Act suit, despite the fact that suit was brought by an appointed personal representative). The opinion below also conflicts with Fed. R. Civ. P. 17(a), which states that no action shall be dismissed on the ground it is not prosecuted in the name of the real party in interest unless a reasonable time has been allowed for joinder or substitution of the party, in which case the joinder or substitution has the same effect as if the action had been commenced in the name of the real party in interest.

V. The Administrative Claim Forms Submitted To The United States Were More Than Adequate To Fully Apprise Any Attentive Reader Of The True Nature of The Claims At Issue

Beverly Haceesa's administrative claim form sought recovery for loss of spousal support. The claims submitted on behalf of Shenoel Haceesa are claims that can **only** be brought in New Mexico as part of a wrongful death action on behalf of the Estate of the Decedent. The opinion below ignores the fact that the United States was provided with all the information required to put it on notice that Petitioners were presenting a claim for the wrongful death of Hardy Haceesa. It also ignores the fact that the United States expressly agreed to

amendment of Plaintiffs' Complaint prior to the expiration of the six (6) month period in question. In this way, the decision is in conflict with the opinions of other Circuit Courts such as *Kelly v. United States*, 568 F.2d 259, 268 (2nd Cir.), *cert. denied*, 439 U.S. 830 (1978)(complaint filed more than two years after accident deemed timely where the United States certified the individual employee was acting within the scope of his employment).

The court below concludes that the claim asserted by Beverly Haceesa on July 2, 1998 asserted "claims only on her own behalf (e.g., a claim for loss of consortium)...". (App., *infra* 1.21). This conclusion cannot be reconciled with established New Mexico law in light of the fact that the basis for the claim clearly states, as the first element of damages sought, "loss of spousal support". *See*, N.M. Rules Ann. 1986, 13-1830 (N.M. Uniform Jury Instruction establishing measure of damages for wrongful death including elements for loss of spousal support).

The original Complaint filed in connection with this administrative claim on January 15, 1999 asserted, as elements of damage, lost of past, present and future earnings and loss of household services. (App., *infra* 1.80-81). These elements of damage cannot be claimed in New Mexico unless they are brought as a wrongful death action on behalf of the surviving beneficiaries of the decedent. *See*, N.M. Rules Ann. 1986, 13-1830, Directions For Use (providing that all elements of damage recoverable in a wrongful death action are recoverable by a plaintiff acting on behalf of the surviving beneficiaries of the decedent, with the exception of emotional distress damages sought by the surviving spouse or familial

caretaker, in which case "the damages in item 6 should not be included in the instruction").

Likewise, the opinion below concludes that by asserting claims on behalf of Shenoel Haceesa for loss of parental support, the conservator did not indicate that he was acting on behalf of the Estate of Hardy Haceesa. This conclusion is a legal impossibility. Even a cursory review of N.M. Rules Ann. 1986, 13-1830, and corresponding case law shows that such claims can only be brought by a personal representative acting on behalf of the Estate of the decedent.

In *Murray v. United States*, 73 F.3d 1448 (7th Cir. 1996), the Court concluded that although some of the contents of the administrative form lacked specific references to some of the claims ultimately brought by the Plaintiffs, if one read everything submitted, including the letters that accompanied the claim, the missing "informed consent claim would leap out at the legally sophisticated reader. The government thus had all notice that the law required...". *Murray* 73 F.3d at 1453 (emphasis added). Each and every claim submitted here, from the first to the last, alerts the United States that the Petitioners intended to file a New Mexico Wrongful Death action to recover damages for loss of spousal support, loss of parental guidance and counseling, both on their own behalf and on behalf of the Estate.

The only reported decision on all fours with this situation is *Sullivan v. United States*, 777 F. Supp. 695 (N.D. IN 1991). *Sullivan* held that a Federal Tort Claims Act notice that was timely filed in an Indiana wrongful death action was sufficient to permit the filing of a

subsequent suit that included all persons and types of claims allowed under the state's wrongful death statute, even though the specific persons or claims were not separately named in the notice. The court found that because Indiana, like New Mexico, has a single cause of action for wrongful death, any failure to file separate claims for the individual children or loss of consortium was irrelevant.

> The government, pursuant to 28 CFR 14.4(a)(3) had authority to request information concerning the decedent's survivors and could have easily identified qualified claimants.... [T]he only "loss of consortium" claim [Plaintiff] now has is one which she may appropriately assert in this wrongful death action. As [Plaintiff] identified herself as a wrongful death claimant on the claim form..., she has fulfilled the jurisdictional requirements for bringing her claim for loss of consortium.

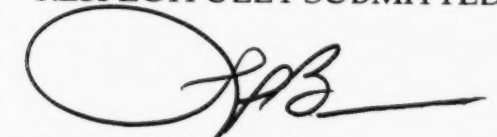
Sullivan, 777 F. Supp. at 700.

The United States must not be encouraged to continue to act in the manner demonstrated here. Legitimate claims for wrongful death that fully and fairly apprise the government of the nature of the suit it faces deserve to be resolved on their merits, not on hyper technicalities used by the government's counsel in an effort to avoid the legal consequences of the actions of their clients.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

RESPECTFULLY SUBMITTED,



Turner W. Branch,
Counsel of Record
2025 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
(505) 243-3500
Counsel for Petitioners

Of Counsel:
James P. Lyle
1116 2nd Street, N.W.
Albuquerque, NM 87102
(505) 843-8000

April, 2003

APPENDIX:

I. OPINION ENTERED IN CONNECTION WITH THE JUDGMENT SOUGHT TO BE REVIEWED:

309 F.3d 722

BEVERLY HACEESA, individually, and FIRST FINANCIAL TRUST COMPANY, as Conservator for SHENOEL HACEESA, a minor,

Plaintiffs - Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant - Appellant.

No. 01-2252

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

October 24, 2002, Filed

Appeal from the United States District Court for the District of New Mexico. (D.C. No. CIV-99-0060 MV/RLP).

COUNSEL

William G. Cole, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C. (Robert S. Greenspan, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., Robert D. McCallum, Jr., Assistant Attorney General, and David C. Iglesias, United States Attorney, with him on the briefs), for Defendant-Appellant.

James P. Lyle, Law Offices of James P. Lyle, P.C., Albuquerque, New Mexico (Turner W. Branch, Branch Law Firm, Albuquerque, New Mexico, with him on the brief), for Plaintiffs-Appellees.

JUDGES

Before EBEL, McKAY and BRISCOE, Circuit Judges.

AUTHOR: EBEL

OPINION

EBEL, Circuit Judge.

On the evening of Saturday, April 25, 1998, twenty-five year-old Hardy Haceesa walked into a hospital emergency room complaining of a fever, difficult and painful breathing, chest discomfort, and general achiness. He told the nurse he thought his condition could be the result of exposure to mice. Haceesa was sent home that night, diagnosed with bronchitis and told to check back at the local clinic on Monday. By Tuesday evening, he was dead.

Only after his death was Haceesa's disease diagnosed correctly: he died of hantavirus pulmonary syndrome, a rare, deadly disease caused by exposure to airborne particles of the urine of infected mice and characterized in its early stages by flu-like symptoms. Haceesa was a Navajo Indian, and the hospital where he was first seen on April 25 - the Northern New Mexico Navajo Hospital in Shiprock, New Mexico - is owned and operated by the Indian Health Service, an agency of the United States Department of Health and Human Services. As the district court observed, Shiprock Hospital stands "in the geographic center of the world for" hantavirus.

The present suit was brought by Haceesa's widow Beverly Haceesa and his four year-old daughter Shenoel,

alleging medical malpractice in the failure to diagnose Haceesa's hantavirus. The suit was brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq. After a bench trial in federal district court for the District of New Mexico, the court found the Government liable and awarded the Plaintiffs damages of over $ 2.1 million.1 On appeal, the Government no longer disputes its liability, but challenges the damages awarded on three distinct grounds. First, it argues that New Mexico's $ 600,000 statutory cap on medical malpractice recoveries applies to the Plaintiffs' suit. Second, the Government argues that its liability should be reduced to reflect its comparative negligence relative to a subsequent health care provider that also failed to diagnose Haceesa's hantavirus. Third, it argues that certain of the Plaintiffs' claims are barred because they were not administratively exhausted at the time suit was filed. The district court rejected all three arguments. We conclude that the district court erred (1) in concluding that the recovery cap did not apply; (2) in failing to calculate the Government's liability on the basis of New Mexico's "loss of chance" approach; and (3) in concluding that the Estate's claim for wrongful death was timely filed. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

I. APPLICATION OF THE FTCA TO NEW MEXICO'S CAP ON MEDICAL MALPRACTICE RECOVERIES

The district court awarded the Plaintiffs over $ 2.1 million in damages. The Government argues on appeal that this damages award should have been subject to New Mexico's $ 600,000 cap on medical malpractice recoveries. N.M. Stat. § 41-5-6(A) ("the recovery cap"). The district court rejected this argument:

The New Mexico cap on damages under the New Mexico Medical Malpractice Act does not apply in this case. The cap only applies to negligence by a "health care provider," which is defined as a "person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant." NMSA § 41-5-3(A). Plaintiffs' claims against the hospital administrators who elected to provide absolutely no training to Nurse Rhodes, as well as their claims of negligence against Nurse Rhodes, are not capped under the statute.

In other words, the district court concluded that (1) the recovery cap applies only to suits against health care providers, and (2) that Haceesa's suit against hospital administrators and a nurse was not a suit against health care providers. On appeal, the Government challenges each of these conclusions. The Plaintiffs, meanwhile, argue for affirmance on the alternative ground that, under New Mexico law, the Government is not entitled to the benefit of the recovery cap. After summarizing the relevant law, we address each of these three arguments below.2

Under the FTCA, the United States is liable for its tortious conduct in the same manner and to the same extent as a private individual under like circumstances in that jurisdiction would be liable. 28 U.S.C. §§ 1346(b), 2674. Here, our charge is to determine first the scope and applicability of the limits New Mexico statutes impose on the medical malpractice liability of private entities.

New Mexico's recovery cap provides: "Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of

malpractice shall not exceed six hundred thousand dollars ($ 600,000) per occurrence." N.M. Stat. § 41-5-6(A). "A health care provider's personal liability is limited to two hundred thousand dollars ($ 200,000) for monetary damages and medical care and related benefits . . . . Any amount due from a judgment or settlement in excess of two hundred thousand dollars . . . shall be paid from the patient's compensation fund . . . ." Id. § 41-5-6(D). As the district court noted, the statute defines "health care provider" as a "person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant." N.M. Stat. § 41-5-3(A). "'Malpractice claim' includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care . . . ." Id. § 41-5-3(C).

Not all "health care providers," however, are entitled to the benefit of the recovery cap: "A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it." Id. § 41-5-5(C). In order to be "qualified," a health care provider must "(1) establish its financial responsibility by filing proof . . . of malpractice liability insurance . . . of at least two hundred thousand dollars . . .; and (2) pay the [Patient's Compensation Fund] surcharge." Id. § 41-5-5(A).

A. Whether the recovery cap applies to a suit against the Government

The Plaintiffs argue that we need not reach the question of whether the district court's rationale for refusing to apply the recovery cap is correct, because the

Government is not "qualified" within the meaning of the Medical Malpractice Act and therefore ineligible to benefit from the recovery cap. The Government does not dispute that it has not filed proof of liability insurance and has not paid any surcharge into the Patients' Compensation Fund, and thus, by the terms of section 41-5-5, is not "qualified."

Three circuits have considered arguments similar to that now offered by the Plaintiffs, and all three circuits have held that the Government was entitled to the recovery cap despite failure to file proof of financial responsibility and to contribute to a compensation fund. *See ... Carter v. United States*, 982 F.2d 1141, 1143-44 (7th Cir. 1992); *Lozada v. United States*, 974 F.2d 986, 987 (8th Cir. 1992); *Owen v. United States*, 935 F.2d 734, 737-38 (5th Cir. 1991). The rationale supporting these holdings is that (1) the FTCA refers to like circumstances rather than identical circumstances,3 (2) the financial responsibility of the United States is assured, and (3) its failure to contribute to a compensation fund is immaterial because (unlike qualified providers) it must pay its liabilities without resort to the compensation fund.4 This court has endorsed these holdings. *Hill v. United States*, 81 F.3d 118, 121 (10th Cir. 1996) (citing, inter alia, *Carter*, *Lozada*, and *Owen*, and stating, "These cases stand for the proposition that where there is a specific cap on tort liability, the United States government may benefit from this limit although it did not otherwise participate in the statutory scheme which provides the cap. . . ."5

The Plaintiffs endeavor to distinguish *Carter*, *Lozada*, and *Owen* by arguing that New Mexico law "requires the United States to attend a Medical Review Panel hearing" and "grants plaintiffs the benefit of having a physician selected to assist them in continuing to pursue their claims if they are found to have merit." In essence, Haceesa's theory (offered without supporting authority) is that participation in the medical review commission procedures amounts to a

qualification for purposes of section 41-5-5, and that New Mexico's qualification procedure thus is materially different from those at issue in *Carter*, *Lozada*, and *Owen*. We disagree. The Medical Malpractice Act establishes two actions that a health care provider "shall" perform "to be qualified": filing proof of insurance and payment of a compensation fund surcharge. N.M. Stat. § 41-5-5. The absence from section 41-5-5 of any requirement of participation in the commission procedures demonstrates the error in the Plaintiffs' argument. In any event, we note the Plaintiffs are mistaken that health care providers are obligated to attend panel hearings. Id. § 41-5-19(A) (providers and their attorneys "may" attend).

The Plaintiffs next argue that "private individuals under like circumstances," 28 U.S.C. § 2674, generally have not availed themselves of New Mexico's qualification procedures, and thus the Government should not be regarded as having done so. (Aple B. 18 ("A review of reported New Mexico cases indicates that most cases brought against negligent hospitals are outside the NMMMA." (citations omitted)).) By contrast, in *Carter*, the Seventh Circuit noted that "according to the record, more than 90% of the private medical providers" had satisfied analogous qualification procedures. 982 F.2d at 1143. It is not apparent to us why the United States should be precluded from taking advantage of a state liability cap just because a substantial majority of private medical providers voluntarily chose not to qualify as a qualified health care provider. In any event, the record before us is totally inadequate even to establish Plaintiff's factual premise. Accordingly, this argument fails.

Finding persuasive the holdings of all of the other circuits to address this issue, we conclude that the Government is not ineligible to invoke the recovery cap merely because it did not satisfy the relevant state

qualification procedures. Therefore, we reject Haceesa's proposed alternative grounds for affirmance, and we turn to the grounds actually relied upon by the district court for concluding that the recovery cap did not apply.

B. Whether the $ 600,000 recovery cap applies only to health care providers.

As noted above, the definition of health care provider does not include nurses (except for nurse anesthetists, which the nurse here undisputedly was not) or hospital administrators. On this basis, the district court concluded that the recovery cap did not apply in the present case. The Government argues, however, that the $ 600,000 cap is not limited to actions against "health care providers," but instead applies to all malpractice defendants. By its terms, the Government argues, section 41-5-6(A) limits how much "all persons" may recover "for or arising from any injury or death to a patient as a result of malpractice." Only section 41-5-6(D)'s $ 200,000 cap on personal liability refers expressly to "health care providers." The New Mexico courts have not ruled on whether the recovery cap applies to all malpractice actions or only those brought against health care providers, so we must predict how they would resolve the issue.

The Government's argument assumes that the phrase "amount . . . for or arising from any injury or death to a patient as a result of malpractice, "§ 41-5-6(A), has a meaning distinct from "malpractice claim," which is defined in relevant part by the Act to "include[] any cause of action . . . against a health care provider for . . . lack of medical treatment." N.M. Stat. § 41-5-3(C) (emphasis added). We need not decide this question because of our conclusion in the next section that the United States is a qualified health care provider for purposes of this suit.

C. Whether the Government is a health care provider for purposes of this suit.

Ultimately, whether the recovery cap applies to the Plaintiffs' present suit turns on whether this FTCA suit against the United States, arising from the actions of a nurse and health care administrators, is a suit against a "health care provider" within the meaning of the recovery cap statute. To answer this question, we begin with the text of the statutory provisions governing FTCA liability. Under 28 U.S.C. § 1346(b) , "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable." Under 28 U.S.C. § 2674, "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." Finally, as already noted, New Mexico's statutory recovery cap applies only to suits against "health care providers," a term that includes hospitals but does not include either nurses or hospital administrators.

The issue before us is one of statutory interpretation. If "private person," § 1346(b), and "private individual," § 2674, includes employers, then the recovery cap applies here because the private employer analogous to a government hospital is a private hospital. Section 1346(b) unmistakably is couched in the language of an employer's respondeat superior liability, creating jurisdiction over actions "against the United States . . . for injury . . . caused by the . . . wrongful act . . . of any employee . . . while acting within the scope of his office or employment." § 1346(b). See, e.g., Restatement (Second), Agency § 219(1) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.") Further, §

1346(b) refers to "circumstances where the United States, if a private person, would be liable." Because in reality the United States is not an individual employee but only an employer, this phrasing suggests that the only shoes that the Government stands in under the FTCA are those of private employers.

We think the text of the FTCA best supports the Government's employer interpretation, a conclusion buttressed by our rule that any waiver of sovereign immunity "'must be construed strictly in favor of the sovereign and not enlarged beyond what its language requires.'" United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 547 (10th Cir. 2001) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1991)) (internal quotation marks and alteration omitted).

To the extent that this issue is not resolved by the text of the statute, we look to legislative intent, and we conclude that Congress has spoken to this question. In enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, Congress found that "the United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment." § 2(b), 102 Stat. 4564, 28 U.S.C. § 2671 note. Cf. H.R. Rep. 100-700 at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949 (describing government's FTCA liability as "vicarious").

Accordingly, we conclude that the Government's liability under the FTCA is limited to that of a private employer under like circumstances. Our conclusion is consistent with that of at least two other circuits. See ... St.

John v. United States, 240 F.3d 671, 676 (8th Cir. 2001) ("The FTCA is a limited waiver of sovereign immunity, allowing the federal government to be sued for the actions of 'any employee of the Government while acting within the scope of his office or employment' under circumstances where the United States would be liable if it were a private employer. 28 U.S.C. § 1346(b) and 2674."); *Johnson v. Sawyer*, 47 F.3d 716, 730 (5th Cir. 1995) ("All FTCA liability is respondeat superior liability. . . . Under the FTCA, the United States is not liable if the private employer would not be liable pursuant to local law."); see also ... *Bryant v. United States*, 126 F. Supp. 2d 1227, 1234 (2000); cf. ... *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420, 132 L. Ed. 2d 375, 115 S. Ct. 2227 (1995) ("Generally, [FTCA] cases unfold much as cases do against other employers who concede respondeat superior liability."). The only circuit to reach a contrary conclusion did so in a split decision. *Knowles v. United States*, 91 F.3d 1147, 1150 (8th Cir. 1996) (2-1 decision). The issue in *Knowles* was similar to the one that we face, namely whether an FTCA suit against the United States arising from the alleged malpractice of medical specialists employed by the government was subject to South Dakota's $ 1 million cap on medical malpractice damages. The *Knowles* majority concluded that the recovery cap did not apply, reasoning as follows:

> Under the FTCA, the United States will be held liable to the same extent as a private party. It is standing in the shoes of the medical service specialists. Therefore, the United States shares in the protection of the statute to the same extent the individuals would if they were sued directly. It follows, then, that if medical services specialists, individually, are not protected by the statute, neither is the United States shielded from the consequences of their negligence.

91 F.3d at 1150 (internal quotation marks and alterations omitted). In dissent, Judge Beam reasoned that "the 'hypothetical private party' is analogous to a private employer," *Id.* at 1153, and "the government cannot stand in the shoes of a negligent federal employee, individually, because the employee is immune from suit." *Id.* at 1154. Ultimately, the dissent concluded that the government has waived immunity and hence "is liable only under a statutorily-imposed respondeat superior theory. " Id.

We find the *Knowles* dissent more persuasive. The panel majority made no effort to come to grips with the language of § 1346(b), which, as noted above, supports the view that FTCA constitutes respondeat superior liability. Nor did it acknowledge Congress's statement of intent in the note to § 2671. Finally, the majority did not purport to construe strictly Congress's FTCA waiver of sovereign immunity.

D. Conclusion

For the foregoing reasons, we conclude that the district court's ruling that New Mexico's $ 600,000 recovery cap is inapplicable to the present suit is erroneous. We hold that, because an analogous suit against a private hospital based on the actions of employees who are not themselves health care providers would be subject to the recovery cap, the Plaintiff's present FTCA suit against the Government is also subject to the $ 600,000 cap.

II. CONCURRENT/SUCCESSIVE TORTFEASORS

During trial, the Government attempted to prove that physicians at San Juan Regional Medical Center (San Juan Regional), where Haceesa visited and was treated on April 27 and 28 (after his visit to Shiprock Hospital on April 25), were negligent in failing to accurately diagnose

Haceesa's illness. The Government further argued that damages should be apportioned between it and San Juan Regional. In its post-trial decision, the district court made no factual findings regarding Haceesa's treatment at San Juan Regional, nor did it reach any conclusions regarding San Juan Regional's alleged negligence. Instead, it concluded that "under New Mexico law, . . . the negligence of the [Government] was successive, and not concurrent with, any negligence of San Juan Regional Medical Center on April 27th and 28th, 1998," and that, accordingly, the Government was liable for all damages incurred by plaintiffs. Aplt. App. at 125.

On appeal, the Government contends that the district court erred in labeling it and San Juan Regional as successive rather than concurrent tortfeasors. The Government further argues that the district court should have quantified the fault of the Government relative to that of San Juan Regional and reduced the damages to be paid by the Government. For the reasons outlined below, we agree with the district court that the Government and San Juan Regional were successive tortfeasors, but we reject the district court's conclusion that the Government is responsible for all damages incurred by the plaintiffs.

Joint tortfeasor liability in New Mexico is governed by section 41-3A-1 of the New Mexico Statutes, entitled "Several liability." This provision in effect defines two distinct categories of cases. One category involves cases "where a plaintiff sustains damage as the result of fault of more than one person which can be causally apportioned on the basis that distinct harms were caused to the plaintiff." N.M. Stat. Ann. § 41-3A-1(D). As to cases in this category, each tortfeasor "is severally liable only for the distinct harm which that person proximately caused." *Id.* The other category involves "any cause of action to which the doctrine of comparative fault applies," id. § 41-3A-1(A), which

category implicitly consists of all joint tortfeasor cases not covered by § 41-3A-1(D). As to cases in this category, each tortfeasor who establishes that the fault of another is a proximate cause of a plaintiff's injury "shall be liable only for that portion of the total [damages] . . . that is equal to the ratio of such defendant's fault to the total fault attributed to all persons." *Id.* § 41-3A-1(B). These two categories have come to be identified in New Mexico case law respectively as cases involving "successive" tortfeasors and those involving "concurrent" tortfeasors. *See, e.g., ... Lujan v. Healthsouth Rehab. Corp.*, 120 N.M. 422, 902 P.2d 1025, 1028-29 (N.M. 1995) ("[Defendants] are not concurrent tortfeasors; they are successive tortfeasors by reason of divisible and causally-distinct injuries.").

In *Lujan*, the court listed several factors that are relevant in determining whether tortfeasors are successive or concurrent. These factors include: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant. 902 P.2d at 1029. Although those factors have since been criticized, see ... *Lewis v. Samson*, 1999-NMCA-145, 992 P.2d 282, 299-300, 128 N.M. 269 (N.M. Ct. App. 1999) (Hartz, J., concurring in part, dissenting in part), they remain valid. See ... *Lewis v. Samson*, 2001-NMSC-35, 35 P.3d 972, 984 n.3, 131 N.M. 317 (N.M. 2001) (noting criticism of factors but declining to engage in further examination of distinction between concurrent and successive tortfeasors).

Although several factors perhaps could be construed either way, we conclude that the first and fifth factors strongly support the district court's conclusion that the Government and San Juan Regional were successive

tortfeasors. It is uncontroverted that the acts of alleged negligence committed by Shiprock Hospital and San Juan Regional occurred days apart from one another and in different locations. In light of the fact that hantavirus is a rapidly progressing disease, and that Haceesa presented to San Juan Regional with more severe symptoms than he did when he visited Shiprock Hospital, we conclude that the alleged negligent acts of Shiprock Hospital and San Juan Regional, though similar in type (i.e., failure to properly diagnose and treat), were distinct.

More importantly, we conclude that the nature of the harm caused by each of the hospitals was different. In *Alberts v. Schultz*, 1999-NMSC-15, 975 P.2d 1279, 126 N.M. 807 (N.M. 1999), the court recognized the loss-of- chance - of-survival theory. In describing the theory, the court noted that "[a] claim for loss of chance is predicated upon the negligent denial by a healthcare provider of the most effective therapy for a patient's presenting medical problem," and "the negligence may be found in such misconduct as an incorrect diagnosis, the application of inappropriate treatments, or the failure to timely provide the proper treatment." *Id.* at 1282. The court further noted that "every patient has a certain probability that he or she will recover from the presenting medical problem," and "under the loss-of-chance theory, the health provider's malpractice has obliterated or reduced those odds of recovery that existed before the act of malpractice." *Id.* (emphasis added). The court emphasized that "the patient does not allege that the malpractice caused his or her entire injury," but rather claims "that the health care provider's negligence reduced the chance of avoiding the injury actually sustained." *Id.* at 1283 (emphasis added). Consistent with these statements, the court noted: "We see no reason at this time to limit lost-chance claims to those cases in which the chance of a better result has been utterly lost." *Id.* at 1285.

Here, the Government concedes that "Haceesa's [condition] was far more serious when he visited [San Juan Regional] on April 27 and 28, 1998," than when he first visited Shiprock Hospital on April 25, 1998. Govt. Br. at 23-24. This admission, in our view, acknowledges that Haceesa had lost a significant chance of survival between his visit to Shiprock Hospital and his subsequent visits to San Juan Regional. Stated differently, we conclude that the Government's failure to properly diagnose and treat Haceesa on April 25 reduced his chance, to some degree, of recovering from his illness, and that San Juan Regional's subsequent failure to properly diagnose and treat Haceesa on April 27 and 28 further reduced his chances, thus resulting in separate and divisible injuries.6

The remaining question is whether the Government is responsible for all of the plaintiffs' damages, including those emanating from San Juan Regional's alleged negligent treatment. Plaintiffs assert that the Government was an "original tortfeasor" and thus liable for San Juan Regional's subsequent medical negligence. In support of their assertion, plaintiffs point to the following statement by the court in Lewis : "the original tortfeasor is jointly and severally liable for the entire harm to the plaintiff, including the original injury and any foreseeable enhancement of the injury by medical negligence." 35 P.3d at 985.

We reject plaintiffs' arguments. *Lewis* involved an original tortfeasor who stabbed the plaintiff, and a subsequent tortfeasor who committed medical malpractice while endeavoring to treat the injuries resulting from the original tort. In discussing the liability of the original tortfeasor, the court was careful to emphasize that its discussion was limited to the "narrow class of cases" involving "an initial injury caused by tortious conduct and a subsequent enhancement of the initial injury caused by foreseeable medical negligence occurring during the course

of medical treatment for the initial injury." *Id.* at 984 (emphasis added). Here, in contrast, Haceesa's initial injury was not caused by the Government, but rather by the hantavirus. In other words, the medical negligence allegedly committed by San Juan Regional occurred during an attempt to treat the condition caused by the hantavirus, not during an attempt somehow to treat the injury (loss of chance) caused by the Government's own medical negligence.7 Thus, *Lewis* is distinguishable from the instant case, and the district court erred in characterizing the Government as an original tortfeasor responsible for all of plaintiffs' damages. On remand, it will be necessary for the district court to make findings of fact regarding the loss of chance of survival caused by the Government's medical negligence and the amount of damages associated exclusively with that loss of chance.

III. JURISDICTION OVER CLAIMS OF THE ESTATE

The Government contends the district court lacked jurisdiction over the claim asserted by the Estate of Haceesa (the Estate). According to the Government, the Estate failed to file its claim in federal district court within six months of the denial of its administrative claim by the Government. Accordingly, the Government argues, "the district court's award must be limited to claims properly filed by [Haceesa's] wife and daughter." Aplt. Br. at 16.

In order to address the Government's arguments, it is necessary to outline, in some detail, the chain of events surrounding the filing of the Estate's administrative claim and its action in federal district court. Following Haceesa's death, three separate administrative claims were filed with the Government (more precisely, with the Indian Health Service). The first two claims, one by plaintiff Beverly Haceesa and the other by the conservator for Shenoel Haceesa, were filed on July 2, 1998. The third administrative

claim, by the Estate, was filed on October 26, 1998. On January 15, 1999, prior to any formal resolution of any of the administrative claims by the Government, plaintiffs Beverly Haceesa, appearing individually, and the conservator for Shenoel Haceesa filed this FTCA action against the Government. On April 28, 1999, the Government sent a formal notice denying all three administrative claims.8 On December 3, 1999, plaintiffs filed a motion to amend their complaint by interlineation to (1) add Beverly Haceesa as personal representative of the Estate, and (2) to add claims for Haceesa's loss of enjoyment of life, pain and suffering, and emotional distress. On March 6, 2000, the district court granted plaintiffs' motion to amend. On April 20, 2000, plaintiffs formally filed their amended complaint.

The FTCA sets forth the following parameters for filing suit. After a tort claim against the Government accrues, a claimant has two years to present that claim in writing to the appropriate federal agency for consideration. *See* 28 U.S.C. § 2401. Following submission of a written claim, a federal agency generally has six months to reach a final disposition on the claim. If the federal agency denies the claim, the claimant has six months thereafter to file suit in federal court.9 *See id.* If the federal agency fails "to make a final disposition of [the] claim within six months," the claimant may deem the agency's failure "a final denial of the claim" and may proceed with his or her suit under the FTCA (again within the six-month period previously noted). 28 U.S.C. § 2675(a). A district court must dismiss a claim under the FTCA if it was filed before the claim was denied by the federal agency (either expressly or implicitly). *McNeil v. United States*, 508 U.S. 106, 113, 124 L. Ed. 2d 21, 113 S. Ct. 1980 (1993).

Applying these principles, we conclude the Estate's claims were not filed within the requisite time parameters. As noted, the Estate filed its administrative claim with the

Government on October 26, 1998. That claim was officially denied by the Government on April 28, 1999. Plaintiffs did not thereafter act within six months to either add the Estate as a party or to file a separate action on behalf of the Estate. Instead, plaintiffs filed their motion to amend the complaint to add the Estate as a party and to add the Estate's claims for relief on December 3, 1999, more than a month after the six-month time period for filing suit on behalf of the Estate had expired. Assuming that the amendments to plaintiffs' complaint related back to the date of the original complaint, see Fed. R. Civ. P. 15(c) (discussing relation back of amendments), the Estate's claims would be premature under *McNeil*. More specifically, the original complaint was filed on January 15, 1999, before the Estate's administrative claim was denied and fewer than six months after the Estate's administrative claim was filed.

The only way that the Estate's claims could be considered valid would be if the administrative claims filed on July 2, 1998, by Haceesa's wife and daughter were sufficient to place the Government on notice that they were seeking to assert a wrongful death claim on behalf of the Estate. If there are multiple claimants in an FTCA case, "each claimant must 'individually satisfy the jurisdictional prerequisite of filing a proper claim.'" *Muth v. United States*, 1 F.3d 246, 249 (4th Cir. 1993) (quoting *Frantz v. United States*, 791 F. Supp. 445, 447 (D. Del. 1992)). Although it appears permissible for multiple claims to be asserted on a single claim form, to be valid "the form must give 'constructive notice' sufficient to warrant [government] investigation of each claim." *Frantz*, 791 F. Supp. at 447-48; see ... *Barrett v. United States*, 845 F. Supp. 774, 783 (D. Kan. 1994) (holding that "plaintiff must show that it gave specific notice of the claimants and the nature of the injury as to both causes of action [asserted in complaint], or face dismissal for lack of jurisdiction"). In the circumstances here, the question is whether the administrative forms filed

on July 2, 1998, gave the Government specific notice that the claimants intended to assert causes of action on their own behalf (e.g., a claim by Beverly Haceesa on her own behalf for loss of consortium) and on behalf of the Estate.

To decide this question, we first turn to New Mexico tort law. Under the New Mexico Wrongful Death Act, the personal representative of a deceased person may bring a tort action for wrongful death. N.M. Stat. Ann. § 41-2-3. Damages may be awarded in such an action for, among other things, the decedent's conscious pain and suffering and medical and related care between the date of injury and death. See generally N.M. Stat. Ann. § 41-2-1. In such an action, the finder of fact may also consider a claim by the decedent's minor child for loss of guidance and counseling. *See ... Romero v. Byers*, 117 N.M. 422, 872 P.2d 840, 846 (N.M. 1994); *see also ... Otero v. City of Albuquerque*, 1998-NMCA-137, 965 P.2d 354, 357, 125 N.M. 770 (N.M. Ct. App. 1998) (indicating that it is unclear under New Mexico law whether a minor child may bring a separate cause of action, aside from a wrongful death action, to recover for loss of guidance and counseling). However, loss of consortium damages may not be awarded in such an action to the spouse of the decedent. *See ... Romero*, 872 P.2d at 842. Instead, the spouse of the decedent must bring a separate cause of action in his or her individual capacity to recover such damages. *See id.*

Turning to the administrative claims, the claim filed by Beverly Haceesa on July 2, 1998, briefly described Haceesa's visit to Shiprock Hospital and the events leading to his death. Aplt. App. at 162. When asked on the form to "STATE [the] NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH WHICH FORMS THE BASIS OF THE CLAIM," Beverly Haceesa stated: "Mr. Haceesa died due to failure to properly diagnose and treat. Beverly Haceesa, his wife, makes a [claim] for loss of spousal support, loss of consortium, loss of love and affection,

emotional distress and mental anguish." Id. Later on the same form, Beverly Haceesa indicated that she was seeking $ 4 million in damages for "PERSONAL INJURY." Id. Based upon these responses, we conclude that Beverly Haceesa was asserting claims only on her own behalf (e.g., a claim for loss of consortium) and was not seeking to recover on behalf of the Estate.

The remaining claim is the one submitted by the conservator of Shenoel Haceesa on July 2, 1998. Aplt. App. at 164. This claim was identical to the claim submitted by Beverly Haceesa with one exception. When asked to "STATE [the] NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH WHICH FORMS THE BASIS OF THE CLAIM," the conservator stated: " Hardy Haceesa died due to failure to properly diagnose and treat. Shenoel Haceesa, his four (4) year old daughter, lost her father and hereby makes a claim for loss of parental guidance and support; loss of his love, affection, emotion distress and mental anguish." *Id.* In our view, these claims were focused solely on the loss suffered by Shenoel Haceesa. Although, as previously noted, New Mexico law requires such claims (loss of parental guidance) to be asserted in a wrongful death action, nothing in the claim indicates that the conservator was acting on behalf of the Estate, or was otherwise seeking to recover damages for the damages personally incurred by Haceesa.

This conclusion is bolstered when the October 26, 1998 claim filed by the Estate is examined. Although the Estate's claim is substantially similar to the two claims filed on July 2, 1998, it differs in two important respects. First, when asked to "STATE [the] NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH WHICH FORMS THE BASIS OF THE CLAIM," the claim stated: "Hardy Haceesa died due to failure to properly diagnose and treat. The Estate of Hardy Haceesa makes a claim for loss of

enjoyment of life, pain and suffering, emotional distress and mental anguish." Aplt. App. at 163. Second, when asked to state the amount of damages sought, the claim indicated the Estate was seeking $ 1 million for "PERSONAL INJURY" and $ 4 million for "WRONGFUL DEATH." Id.

In an attempt to salvage the Estate's claims, plaintiffs argue that the Government's attorneys led them to believe that the Government would not object to plaintiffs' amending their complaint to add claims on behalf of the Estate. A review of the plaintiffs' supporting evidence, however, suggests that Government counsel did nothing wrong and there is no basis for applying equitable tolling in this case. In late September 1999, a paralegal working for plaintiffs' counsel sent to Government counsel a draft copy of plaintiffs' proposed motion to amend. Aplt. App. at 44. On October 6, 1999, Government counsel contacted the paralegal and stated "she was not opposed to amendment of the Complaint to include the claims of the Estate, but did not believe that the Complaint could be amended by interlineation." *Id.* Obviously, at the time Government counsel agreed in principle to the complaint being amended, the six-month time period for the Estate to file suit had not expired (the Estate had until approximately October 28, 1999, to do so).

For these reasons, we conclude that the claim of the Estate was not filed within the requisite time periods set forth by the FTCA and is thus "forever barred." 28 U.S.C. § 2401(b). On remand, the district court is directed to dismiss the Estate's claims.

IV. CONCLUSION

We AFFIRM the district court's finding of liability against the Government and in favor of Beverly and Shenoel Haceesa, but VACATE the district court's damage award in

favor of those plaintiffs and REMAND for recalculation of damages consistent with this opinion. We REVERSE the judgment of the district court in favor of the Estate of Hardy Haceesa and REMAND with directions to dismiss the Estate's claims.

OPINION FOOTNOTES

1 The district court found that the Plaintiffs' total damages were approximately $ 3.3 million. Finding as fact that the Government's negligence resulted in the loss of a 65 percent chance that Haceesa would survive, the court awarded damages in the amount of 65 percent of approximately $ 3.3 million or approximately $ 2.15 million (citing *Alberts v. Schultz*, 1999-NMSC-15, 975 P.2d 1279, 126 N.M. 807 (N.M. 1999)).

On appeal, the Plaintiffs do not challenge the district court's decision to reduce the judgment to 65 percent of their damages. Additionally, the Government did not argue below, and specifically disclaimed at oral argument an intention of arguing here, that the damages awarded should have been offset by the amount of a settlement between the Plaintiffs and another hospital that also failed properly to diagnose Haceesa's condition.

2 The Government did not argue below, and conceded at oral argument that it does not argue here, that Government liability for the actions of the hospital administrators in failing to train hospital employees or implement appropriate patient assessment protocols is barred by 28 U.S.C. § 2680(a) (stating that FTCA waiver of immunity "shall not apply to - (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.").

3 This reasoning is consistent with Tenth Circuit case law. *See ... Nationwide Mut. Ins. Co. v. United States*, 3 F.3d 1392, 1396 (10th Cir. 1993) ("Recognizing that the United States is seldom situated identically to private parties, however, the 'like circumstances' inquiry requires only that the United States be analogized to a similarly situated private party. Nice pieces of casuistry and hypersensitive legalisms are to be avoided in interpreting this language." (internal quotation marks and alterations omitted, citations to *Carter* and others omitted)).

4 Here we hold that the Government's liability is subject only to the $ 600,000 cap and not to the individual $ 200,000 cap because the lower individual cap assumes that the amount of damages in excess of $ 200,000 would be paid by the compensation fund. The Government did not pay into the compensation fund and hence cannot look to it to help pay the damage award.

5 Haceesa urges that *Hill* supports rather than undercuts his position by highlighting its statement that "None of these cases [*Carter*, etc.] offers direct support for the proposition that the United States may attempt to create a rough equivalent to a state statute when they clearly are ineligible for the precise remedy provided therein." 81 F.3d at 121. *Hill* drew a distinction between state statutes such as those in *Carter*, *Lozada*, and *Owen* "where there is a specific cap on tort liability" with the situation where the United States was ineligible for a particular remedy yet urged a court "to fashion a remedy that will further the intent and approximate the outcome of a statute." *Id.* at 120-21. The quoted language relied upon by Haceesa does not support her position, because the statutory remedy at issue here is substantially identical to the "specific cap on tort liability" that *Hill* regarded the United States as "undoubtedly" eligible for. *Id.*

6 For example, assume that Haceesa had a 65% chance of survival at the time he was seen and treated at Shiprock Hospital. Further assume that when he was seen at San Juan Regional a few days later, he only had a 20% chance of survival. Under New Mexico law, the failure of Shiprock Hospital to correctly diagnose and treat Haceesa's illness resulted in a loss of chance of survival of 45%. San Juan Regional's subsequent failure to diagnose, assuming it was negligent, would have resulted in a separate loss of chance of survival of 20%.

7 This point becomes more clear if we hypothesize a third potential defendant in the present case, a party whose negligence caused Haceesa's exposure to hantavirus. Assume, for example, that his employer negligently provided an unsafe workplace by ordering Haceesa to work in conditions posing a high hantavirus infection risk. This hypothetical defendant would be an "original tortfeasor" within the ambit of *Lewis*, and would be responsible not only for injuries resulting from his own tortious conduct but also for injuries caused by the subsequent medical negligence of the Government and San Juan Regional. Removal of the hypothetical original tortfeasor from the picture does not transform the first medical provider into an original tortfeasor as those terms are used in *Lewis*.

8 The caption of the letter specifically refers to all three administrative claims. Aplt. App. at 147. Plaintiffs nevertheless contend that the letter addresses only the first two administrative complaints since, in its body, it refers only "to the administrative claims which [were] filed on behalf of Beverly Haceesa and Sheldon Wright, as Conservator for Shenoel Haceesa." *Id.* Plaintiffs' contention in this regard is erroneous. Given the caption of the letter, it is apparent that the letter's subsequent references to claims filed on behalf of Beverly Haceesa refer to both her

individual claims and her claims as representative of the Estate.

9 A tort claim against the Government is "forever barred" if it is not filed within the requisite time period. 28 U.S.C. § 2401(b).

II. OTHER RELEVANT OPINIONS AND ORDERS ENTERED IN THE CASE:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEVERLY HACEESA, Individually, and
FIRST FINANCIAL TRUST COMPANY,
as Conservator for SHENOEL HACEESA,
a Minor,

Plaintiffs,

vs. No. CIV 99-60 LH/RLP-ACE

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion to Amend Complaint by Interlineation (Docket No. 23), filed December 3, 1999. The Court having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, finds that the motion shell be **granted in part** and **denied in part**.

Hardy Haceesa died in April 1998 allegedly as a result of medical negligence at Northern New Mexico Navajo Hospital, which is owned and operated by the United States through its agency, the Indian Health Service. On July 2, 1998, claims were submitted to the Indian Health Service by Beverly Haceesa, Hardy Haceesa's widow, and by Sheldon Wright, First Financial Trust Co., as Conservator for Shenoel Haceesa, Hardy Haceesa's minor daughter. On October 26, 1998, Beverly Haceesa, Personal Representative of Hardy Haceesa, submitted a claim to the Indian Health Service on

behalf of Hardy Haceesa's Estate. The United States Department of Health and Human Services subsequently sent an April 28, 1999 notice of final denial of the claims to Plaintiffs' counsel.

On January 15, 1999, Plaintiffs Beverly Haceesa, individually, and First Financial Trust Co., as conservator for Shenoel Haceesa, filed the complaint in this case for medical negligence and wrongful death. On December 3, 1999, more than six months after the date of the notice of denial, Plaintiffs filed a motion requesting permission to make three amendments to their complaint.[1] The first proposed amendment is to add Plaintiff Beverly Haceesa as the personal representative of Hardy Haceesa. The second proposed amendment corrects the date on which the individual Plaintiffs submitted their claims for agency consideration and adds a sentence which gives the date on which the Estate's claim was first submitted for agency consideration. The third proposed amendment adds two elements of damages: 1) pain and suffering and emotional distress caused to Hardy Haceesa prior to his death; and 2) loss of enjoyment of life to Hardy Haceesa.

Defendant opposes the first amendment, claiming the Court does not have jurisdiction over the claim of the personal representative, which has been brought via the proposed amendment only, and is accordingly untimely. The law provides that "[a] tort claim against the United States shall be

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1 Defendant states that Plaintiffs' failure to file a supporting brief along with their motion, contrary to D.N.M. LR-Civ 7.3(a)(1), constitutes consent to deny the motion pursuant to D.N.M. LR-Civ 7.5(b). Although Plaintiffs did not file a separate supporting brief along with their motion, the discussion presented in and the exhibit attached to the motion exceeds the information required in a motion and will be considered by the Court as a supporting brief.

forever barred . . . unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b). Because §2401(b) constitutes a waiver of the government's sovereign immunity, it must be strictly construed. *Pipkin v. United States Postal Service,* 951 F.2d 272, 275 (10th Cir. 1991) (citations omitted). Courts are not free to construe §2401(b) so as to defeat its purpose of encouraging prompt presentation of claims against the federal government. *United States v. Kubrick,* 444 U.S. 111, 117 (1979) (Statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.")

New Mexico common law allows an amended complaint to relate back where the amendment changes the capacity of the plaintiff to bring suit under New Mexico's Tort Claims Act, there is no change in the parties before the court, and all parties are on notice of the facts out of which the claim arose. *Chavez v. Regents of the University of New Mexico,* 711 P.2d 883 (N.M. 1985). In *Chavez* the natural parents of a deceased girl brought a wrongful death action under the Tort Claims Act within the limitation period. However, the deceased girl's mother was not appointed personal representative until after the limitation period had expired. The New Mexico Supreme Court held that the wrongful death action brought by the natural parents of the deceased girl within the limitation period was not barred because of the plaintiffs' failure to obtain court appointment of a personal representative to sue within the time limitation period. *Id.* at 607. The court noted that allowing the appointment of the personal representative to relate back would not compromise the purpose behind the statute of limitations and would not prejudice the defendants. *Id.* at 611.

Allowing the amendment to add the Personal Representative as a party to this litigation will not defeat §2401's purpose of encouraging prompt presentation of claims against the federal government. Hardy Haceesa's widow and daughter filed the complaint in this matter prior to the issuance of the notice of final denial. *See Ripley v. Childress,* 695 F. Supp. 507, 509 (D.N.M. 1988) ("once a claim has been asserted within the limitation period, the purpose of the statute of limitations has been realized: giving timely notice that litigation arises from a particular transaction or occurrence."). The search for truth in this case will not be impaired by loss of evidence because the proposed amendment adds no new claims but will merely *officially* make the Personal Representative a party to this lawsuit, as contemplated by the New Mexico Wrongful Death Act.[2] Furthermore, leave to amend "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). The proposed amendment will avoid the forfeiture of just claims of the statutory beneficiaries, in this instance Hardy Haceesa's widow and minor daughter. Therefore, the Court will allow the proposed amendment to paragraph 1 of the original complaint.

The second proposed amendment adds neither parties nor claims but only corrects dates in a factual allegation. Defendant raises no objection to this proposed amendment. The Court will allow the proposed amendment to paragraph 8 of the original complaint.

The third proposed amendment adds two elements of damages: 1) pain and suffering and emotional distress caused to Hardy Haceesa prior to his death; and 2) loss of enjoyment of life to Hardy Haceesa. Paragraph 27 of the complaint states "Defendant's negligence . . . proximately caused . . . Hardy

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2 *See* 41-2-3 N.M.S.A. 1978 (1996 Repl.).

Haceesa's pain, suffering and death." Allowing this third proposed amendment, which adds neither new parties nor new claims, will not defeat the purpose behind §2401(b). Furthermore, both of these elements of damages are properly awardable under the New Mexico Wrongful Death Act, as is the claim for loss of parental guidance and counseling. *See, e.g., Romero v. Byers,* 117 N.M. 422 (1994). Therefore, the Court will allow the proposed amendment adding these elements of damages to paragraph 29 of the original complaint, and will allow the parental guidance claim to remain.

Defendant also claims that Plaintiffs cannot establish a mistake concerning the identity of the proper party and thus cannot comply with Fed. R. Civ. P. 15(c)(3). Consequently, the proposed amended complaint would not relate back to the date of the original pleading. The Court disagrees. The complaint sufficiently put Defendant on notice regarding the claim raised in the proposed amended complaint. Consequently, there is no problem of notice to defendants that would prevent relation back of the proposed amended complaint. Such a conclusion is consistent with Fed. R. Civ. P. 71 (a), which provides that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect and such correction shall have the same effect as if the action had been commenced in the name of the real party in interest. *See Chavez v. Regents of the University of New Mexico,* 711 P.2d 883 (N.M. 1985) (Amended complaint joining mother as personal representative after the limitation period, in a wrongful death action brought under New Mexico's Tort Claims Act by parents of deceased child within the limitation period, related back to original complaint).

In its responsive brief, Defendant asks the Court to dismiss the loss of consortium claim. The Court recognizes

that a loss of consortium claim is not awardable under the New Mexico Wrongful Death Act but is a separate common law cause of action which may only be brought by the spouse in an individual capacity. *See Romero v. Byers*, 117 N.M. 422, 424 (1994). The Complaint does not set forth a separate cause of action nor does it state a jurisdictional basis for such a claim, but merely lists loss of consortium as an element of damages. In light of the liberal standard accorded amendments, Plaintiffs will be granted leave to attempt to properly state such a claim.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion To Amend Complaint by Interlineation (Docket No. 23), filed December 3, 1999, is **granted in part** and **denied in part.** Specifically, rather than add the following by interlineation, Plaintiffs are instructed to submit a fully amended complaint to Chambers within 30 days for approval and filing by the Court.

IT IS ALSO ORDERED that amendments to the complaint are strictly limited to the following:

1. Adding Plaintiff Beverly Haceesa, as Personal Representative of Hardy Haceesa, to the caption.

2. Adding the following sentence to paragraph 1 of the original Complaint: "Plaintiff Beverly Haceesa is the Personal Representative of Hardy Haceesa, her former husband who is now deceased."

3. Removing the first sentence of paragraph 8 of the original Complaint and substituting the following in its place: "The claims of Beverly Haceesa, individually, and Shenoel Haceesa were first submitted for agency consideration pursuant to 28 U.S.C. §2675(a) on July 6, 1998. The claims on behalf of Hardy Haceesa's Estate were first presented to the United States Government on October 30, 1998."

4. Adding the following elements of damages to paragraph 29 of the original Complaint: "i. Pain and suffering and emotional distress caused to Hardy Haceesa prior to his death; j. Loss of enjoyment of life to Hardy Haceesa."

5. Adding a separate count containing a cause of action for loss of consortium under New Mexico common law and establishing jurisdiction for this Court over such a claim.

LEROY HANSEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEVERLY HACEESA, Individually, and
FIRST FINANCIAL TRUST COMPANY,
as Conservator for SHENOEL HACEESA,
a Minor,

Plaintiffs,

vs. No. CIV 99-60 LH/RLP-ACE

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant's Motion For Reconsideration of the Court's Memorandum Opinion and Order Entered on March 6, 2002 (Docket No. 32), filed March 10, 2000. The Court having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, finds that the Motion shall be **denied.** The relief afforded Plaintiffs in the March 6, 2000 order shall stand, i.e., Plaintiffs shall be allowed to amend their complaint as described in that order.

Defendant opposes this amendment, claiming that the personal representative, by waiting until after expiration of the statutory period of limitation before attempting to join the suit, is forever barred, and that therefore, this Court lacks subject matter jurisdiction over the claim. The Court, recognizing that a wrongful death suit must be brought by the personal representative under New Mexico law, and having considered Fed. R. Civ. P. 15 and 17, as well as the Federal Tort Claims Act ("FTCA") statute of limitations, and the

purposes behind the rules and statute, granted the motion to amend. Now for the first time, Defendant claims that allowing such amendment would constitute a premature filing under *McNeil* and *Duplan,* thereby depriving this Court of jurisdiction over the claim. *McNeil v. United States*, 508 U.S. 106 (1993); *Duplan v. Harper*, 188 F.3d 1195, (10th Cir. 1999). In *Jones v. Henry,*[1] I recently cited both *McNeill* and *Duplan* as support for dismissal on the basis of premature filing. To avoid the appearance of inconsistency with my decision in this case, I will explain the relevant distinctions between the *Jones* case and this case.

The *Jones* plaintiff filed an administrative claim with the Bureau of Indian Affairs ("BIA"), claiming damages resulting from alleged aggravated assault and malicious prosecution. Approximately two weeks later, he filed a judicial complaint claiming that this Court had jurisdiction under the FTCA. Because there was no evidence that the BIA denied the plaintiff's claim during the two-week interim between filing his claim with the BIA and his filing his complain in this Court, I concluded that the plaintiff filed his complaint prematurely, and as such, had not exhausted his administrative remedies. My conclusion and dismissal of the complaint for lack of jurisdiction were based on *McNeil* and *Duplan.*

The FTCA bars claimants from brining suit in federal court until they have exhausted their administrative remedies. *McNeill,* 508 U.S. at 106 overruling some circuits' holdings that permitted a prematurely filed FTCA action to proceed if no substantial progress had taken place in the litigation before the administrative remedies were exhausted). As a general rule, a premature complaint under the FTCA cannot be cured by amendment, but instead, plaintiff must file a new suit.

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1 No. 99-102 (D.N.M. filed January 29, 1999)

Duplan, 188 F.3d at 1199. In *McNeill*, the plaintiff filed his administrative claim four months after filing his judicial complaint. In *Duplan*, the plaintiffs filed their administrative claim two days after filing suit in state court.[2] In *McNeill*, *Duplan*, and *Jones*, only one administrative claim was filed for the underlying tort. In this case, however, three administrative claims have been filed. Defendant seeks dismissal of this case based on the filing date of only on of the three administrative claims.

Plaintiffs Beverly Haceesa, and First Financial Trust Co., as conservator for Shenoel Haceesa, filed administrative claims on July 2, 1998. Over six months later, on January 15, 1999, they filed the complaint in this case for medical negligence and wrongful death. *See* 28 U.S.C. §2675(a)(failure of agency to make final disposition of a claim within six months shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim). The Court recognizes that, under New Mexico law, wrongful death actions must be brought by and in the name of the personal representative of the estate. N.M.S.A. §41-2-3 (Michie Repl. Pampl. 1996). The complaint is defective because Beverly Haceesa, the personal representative brought the suit in her individual capacity only, and on behalf of herself and her daughter. However, such defects in complaints can often be remedied using Rule 15 or Rule 17 of the Federal Rules of Civil Procedure. This issue then becomes whether the administrative claims filed by the statutory beneficiaries have any bearing on the Court's jurisdiction over this case. Unlike in *Jones*, the complaint was not prematurely filed, and this Court has jurisdiction, if the

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2 The suit was subsequently removed to federal court. The exact date of removal, although not given in the case, occurred within less than three months of filing in state court. The suit in state court was filed on January 10, 1995. On March 27, 1995, the government filed a motion to dismiss the plaintiffs' federal action. *Duplan*, 188 F.3d at 1198.

administrative claims of the statutory beneficiaries meet the notice requirements of the FTCA. The Court concludes they do.

Defendant claims that this conclusion allows a "relation back" of the proposed amendments to the date of the original complaint, and that this would circumvent provisions of the FTCA. These provisions provide that an "action shall not be instituted upon a claim against the United States for money damages ...unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing .... The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim ...." 28 U.S.C. §2675(a). In the absence of a final denial by the agency, filing an FTCA action before the six month period is premature and constitutes a failure to exhaust administrative remedies. Defendant claims that allowing the proposed amendments to relate back to the original complaint would result in a premature filing because the original complaint was filed on January 15, 1999, less than six months after the administrative claim was filed on behalf of the Estate of Hardy Haceesa, on October 30, 1998, and before final denial of the Estate's administrative claim in April, 1999. The Court would, therefore, have no jurisdiction over the Estate's FTCA claims because the Estate failed to exhaust administrative remedies based on the filing dates of the Estate's administrative claim and the judicial complaint alone. However, the named plaintiffs in this case also filed administrative claims.

The federal court derives its jurisdiction for FTCA cases from 28 U.S.C. §2675(a). *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991). Section 2675(a) requires that FTCA claims be presented to the appropriate federal agency by filing (1) a written statement sufficiently describing the injury to enable

the agency to begin its own investigation, and (2) a sum certain damages claim. *Id.* (citation omitted). Both claims filed by Beverly Haceesa and Shenoel Haceesa's conservator describe circumstances attending Hardy Haceesa's death and the resulting damages.[3] Furthermore, each claim states the amount of their wrongful death claim.[4] Although neither plaintiff was the personal representative of the decedent when they filed their administrative claims in this case, their submissions provided Defendant with the minimal notice required under the FTCA so that it could adequately investigate the claims. *See Byrne v. United States*, 804 F.Supp. 577 (S.D.N.Y. 1992)(court had subject matter jurisdiction over FTCA action because plaintiff met the requirements of 28 U.S.C. §2675(a) by filing form prior to the expiration of the two year statute of limitations even though plaintiff was not the personal representative of the decedent at that time). *See also Knapp v. United States*, 844 F.2d 376, 379 (6th Cir. 1988)(failure of widow to file administrative claim as personal representative did not affect jurisdiction of district court in FTCA suit where she was qualified as personal representative when the action was filed in district court); *Van Fossen v. United States*, 430 F.Supp. 1017, 1021 (N.D. Cal. 1977)(statutory

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3 The statements in the claims clearly indicate a wrongful death action and include references to the decedent's pain and suffering and loss of enjoyment of life. Beverly Haceesa's claim also states a loss of consortium claim which is a separate action from wrongful death under New Mexico law. *See romero v. Byers*, 117 N.M. 422, 424 (1994).

4 For the amount of claim for wrongful death, both claims state "Same as Personal Injury." For the amount of claim for personal injury, both claims state "$4,000,000.00." For the total amount of claim, both claims state "$4,000,000.00." While these entries seem somewhat confusing, the claims do state a total sum certain. There is no evidence before this Court that the agency determined that these claims were defective. In fact, the agency evaluated and denied the claims. The agency gave no basis for denial.

beneficiary is proper person to file an administrative claim to fulfill the prerequisite to filing suit under the FTCA even if claimant may have to rely on an appointed representative to bring action in court); Fed. R. Civ. P. 17(a)(no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for joinder or substitution of the real party in interest, and such joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest).

IT IS, THEREFORE, ORDERED that Defendant's Motion For Reconsideration of the Court's Memorandum Opinion and Order Entered on March 6, 2000 (Docket No. 32), filed March 10, 2000, is **denied.**

IT IS FURTHER ORDERED that Plaintiff shall be allowed to amend the complaint as described in the Court's Memorandum Opinion and Order of March 6, 2000. The amended complaint which was submitted to Chambers shall be filed by the Court contemporaneously with this order.

LEROY HANSEN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEVERLY HACEESA, Individually, and
FIRST FINANCIAL TRUST COMPANY,
as Conservator for SHENOEL HACEESA,
A Minor,

Plaintiffs,

vs. CIV No. 99-0060 MV/RLP

UNITED STATES OF AMERICA,

Defendant.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER is before the Court on a bench trial held from April 2 through April 4, 2001. The Court having considered the pleadings, trial testimony, exhibits, relevant law, and being otherwise fully informed, finds that Defendant United States of America did breach its duty of care to Hardy Haceesa in failing to properly diagnose him with the hantavirus, thereby depriving him of the loss of chance to receive proper medical care.

I. BACKGROUND

Plaintiffs brought this suit alleging negligent treatment of 23-year-old Hardy Haceesa at Northern New Mexico Navajo Hospital (NNMNH) in Shiprock, New Mexico on April 25, 1998, which resulted in his death on April 28, 1998. Plaintiffs brought suit pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq. On April 25, 1998, a Saturday, at approximately 8:39 p.m., Hardy Haceesa presented to NNMNH emergency room complaining of chest

discomfort, difficulty breathing, fever, pain on respiration, and generalized aches and pains. He reported that he thought his condition might be related to exposure to deer mice. Mr. Haceesa was seen by nurse practitioner Shelly Rhodes.

Ms. Rhodes recorded a history from Mr. Haceesa, performed a physical examination, and ordered a CBC and chest x-ray. She asked a contract physician, Dr. Patel, who was spending his first day on the job at this hospital, to examine Mr. Haceesa. Dr. Patel elicited a dry cough from Mr. Haceesa. Mr. Haceesa was diagnosed with bronchitis. Prior to discharge, Mr. Haceesa was given one liter of intravenous fluids and prescriptions for erythromycin and ibuprofen. Mr. Haceesa was discharged with instructions to return for a recheck two days later at the local clinic.

Saturday, April 25, 1998 at 11:05 p.m. was the last time Mr. Haceesa was seen or treated by any employee of the United States. Mr. Haceesa sought treatment on Monday, April 27, 1998 and Tuesday, April 28, 1998 from San Juan Regional Medical Center in Farmington, New Mexico. He died shortly after his arrival at University of New Mexico Hospital (UNMH) on April 28, 1998. His post-death diagnosis was Hantavirus Pulmonary Syndrome.

Before making its findings of fact and conclusions of law, the Court will explain the credibility determinations upon which its findings are based. This critical issue in this case was whether Nurse Rhodes' and the NNMNH administration's duty of care fell below the standard of care. Plaintiff presented two experts to testify about the standard of care: Dr. Diane Goade and Dr. Robert Henry. Plaintiff also introduced the transcript of Dr. Stephen Bowers' deposition, for support that the standard of care at UNNMNH was not met. Specifically, Dr. Bowers, an emergency room physician at UNNMNH, indicated that the emergency room staff was told, prior to Mr. Haceesa's arrival, that in

diagnosing hantavirus, the primary symptoms they should look for were unspecified fever and myalgia; that the history that they should look for would be some exposure to mice feces; that the lab value they were supposed to be looking for was primarily platelets below 150,000; that the chest x-rays would often be unremarkable; that as of 1997, at least, the staff was told that there was a blood assay available at the University of New Mexico; and that it was clear that among the laboratory findings, the most reliable was the low platelet count. Plaintiff also introduced several brochures and articles demonstrating the state of the medical knowledge about hantavirus. Many of those publications were issued by the defendant's various agencies, including Indian Health Services (IHS) and the Centers for Disease Control and Prevention (CDC). Beverly Haceesa, the decedent's wife, Jesse Haceesa, the decedent's mother and John Scott, the decedent's employer, all testified that they, as lay people, were familiar with the symptoms of hantavirus in the prodromal phase.

In contrast, two doctors supported the defendant's position that the standard of care was met by Nurse Shelly Rhodes and the hospital administration: Dr. Percy and Dr. Mapel. Both doctors stated that the hospital simply did not have a duty to educate its emergency room personnel about developments in the medical field. They stated that each medical provider is responsible for his or her own education. As to Nurse Shelly Rhodes, both doctors stated that her workup, diagnosis and follow-up plan for Hardy Haceesa met the standard of care.

As to whether or not the defendant should have recognized Mr. Haceesa's presentation as the prodromal phase of hantavirus, or whether the defendant should have at least been on alert that hantavirus was a possible diagnosis, the Court credits Dr. Diane Goade's professional opinion over Dr. Doug Mapel's. Dr. Goade's practice, education, training and publications establish her as the expert in diagnosing

hantavirus patients, whereas Dr. Mapel's experience is with the treatment of the disease. She is a member of various collaborative study groups about hantavirus, and has presented extensively both nationally and internationally about hantavirus. She is a member of the triage team at UNMH who screens and diagnoses of patients for hantavirus. In addition, Dr. Goade has been heavily involved in disseminating information to the public and to medical providers about the hantavirus. Therefore, she is the authority about the state of the knowledge in the field about hantavirus, and specifically, how to screen for and diagnose the disease.

Dr. Goade testified also that the CDC was one of the primary agencies involved in understanding hantavirus and disseminating information about it. Additionally, IHS was involved in disseminating information to the community about hantavirus. Therefore, not only did the general medical community know about how to screen for and diagnose hantavirus, but the defendants knew.

Dr. Goade is also the director of the national hantavirus survivors study. Therefore, the Court gives her opinions about the rate of survivorship, and the health of hantavirus survivors after they have recovered more weight than Dr. Mapel's. As the lead investigator of the survivors study, Dr. Goade personally sees and diagnoses all the patients and evaluates the data. Additionally, the Court finds that Dr. Mapel's testimony about Mr. Haceesa's chance of survival was not very persuasive. Dr. Mapel testified that Mr. Haceesa's survival rate was less than 50 percent. He stated that the survival rate depended only upon the patient's response to treatment, not how soon the disease was detected. He stated that Mr. Haceesa's survival rate was the same on Sunday as it was on Monday. However, Dr. Mapel did not state the medical or clinical basis for his opinion. Although he has significant experience as a physician who treats people with

the hantavirus, he did not provide this Court with any basis for his conclusion that Mr. Haceesa's survival rate was less than 50 percent. In contrast, Dr. Goade stated that the survival rate for Mr. Haceesa was 65 percent. The basis for this opinion was a study put out by the CDC. This was a conservative figure, for Dr. Goade testified that the survival rate for the University of New Mexico Hospital was about 70 percent, which she knows from clinical experience. Therefore, in addition to her own clinical experience, Dr. Goade had the findings of the CDC as support. While Dr. Mapel did not credit the findings of the CDC, this Court does.

Pursuant to Federal Rule of Civil Procedure 52(a), the Court issues the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Plaintiff Beverly Haceesa is a resident of the State of New Mexico, San Juan County. She is the wife of Hardy Hacessa, deceased, and the mother of Shenoel Hacessa.

2. Plaintiff First Financial Trust Company, is a corporation within the State of New Mexico, County of Bernalillo.

3. Beverly Hacessa is the Personal Representative of the Estate of Hardy Hacessa. Plaintiff First Financial Trust Company is the Conservator and guardian of Shenoel Haceesa.

4. The Defendant United States of America operates the Indian Health Service, an agency of the government of the United States of America and, through it, owns and operates Northern New Mexico Navajo Hospital in Shiprock, New Mexico.

5. In April, 1998, Hardy Haceesa was a twenty-three (23) year old male, father of Shenoel Haceesa and husband of Beverly Haceesa. He was employed as a construction worker and in the course of his employment was routinely required to work in structures, buildings and houses where it was possible, if not likely, that he could be exposed to deer mice.

6. On April 25, 1998, at approximately 8:39 a.m. Hardy Haceesa and Beverly Haceesa went to the Northern New Mexico Navajo Hospital (NNMNH) because Hardy was complaining of chest discomfort, difficulty breath, fever and generalized aches and pains.

7. At NNMNH, Hardy were treated by a nurse practitioner named Shelly Rhodes. This was Ms. Rhodes' first job out of nursing school, which she had completed 6 months earlier in Tennessee.

8. NNMNH did not have a regular physician available to take responsibility for the evaluation, care and treatment of Mr. Haceesa. They did have a contract physician, Dr. Bharat Patel, who had been in the State of New Mexico for two days before the Hacessas came to the NNMNH emergency room.

9. When Mr. and Mrs. Haceesa spoke to Nurse Rhodes, they told her that they thought Mr. Haceesa might be suffering from hantavirus. Mrs. Haceesa overheard a conversation with Nurse Rhodes and a male doctor where Nurse Rhode relayed their concern that Mr. Haceesa might have hantavirus, and asked him if there were any brochures around the hospital.

10. Nurse Rhodes noted on examining Mr. Hacessa that he had difficulty breathing, sore throat and nausea and that he was concerned that his symptoms "may be related to entering trailer w/mice". She ordered a CBC which showed

that Mr. Haceesa had an abnormally low platelet count (111,000) and low potassium. She also noted that he had a fever and an overall poor general appearance.

11. As of this time Nurse Rhodes had received absolutely no education or training as to proper diagnosis of potential hantavirus from the defendant prior to the time she was required to evaluate and treat Mr. Haceesa. She did ask that Dr. Patel look at Mr. Haceesa, although she did not ask him to assume responsibility for Mr. Haceesa's care. She did not report the platelet count to Dr. Patel.

12. Dr. Patel, having been in New Mexico for only two days, had no better idea as to how to evaluate a potential hantavirus patient than did Nurse Rhodes. He did manage to elicit a dry and non-productive cough from Mr. Haceesa. However, Nurse Rhodes, not the doctor, remained the person responsible for Mr. Hacessa's care during the entire time he was seen and treated at NNMNH.

13. Nurse Rhodes diagnosed Mr. Haceesa with bronchitis, prescribed erythromycin and ibuprofen, sent him home and told to him to return to the local clinic near their home for a recheck in two (2) days.

14. Mr. Hacessa's symptoms were consistent with a typical patient suffering from the early stages of hantavirus, which include complaints of pain on breathing, fever, abnormally low platelet count, nausea, and exposure to rodent droppings. While cough occurs in a minority of cases, when present, it is characterized by a dry or non-productive cough of the kind Dr. Patel elicited from Mr. Haceesa.

15. The fact that Mr. Haceesa also complained of a sore throat does not rule out hantavirus, or make it any more reasonable for the medical providers at NNMNH to have missed the diagnosis.

16. The University of New Mexico Hospital had a hantavirus blood test available on a 24 hour, 7 day a week basis at the time Mr. Haceesa was seen at NNMNH. Results were available within hours from the time they were submitted. Despite the report of rodent exposure and despite the fact that this is an area of the country where more cases of hantavirus have been diagnosed than anywhere else, a blood test to determine the possibility of hantavirus was not taken from Mr. Haceesa and sent to the University of New Mexico Hospital. Nurse Rhodes had no idea such a blood test was even indicated.

17. Mr. Haceesa died of hantavirus three (3) days later on April 28, 1998. Between the time of defendant's negligence and the time of his death he endured pain, suffering and emotional distress.

18. The failure of the agents and employees of NNMNH to properly diagnose and manage Mr. Haceesa's hantavirus resulted in a loss of any chance he had to survive the disease. With proper diagnosis and treatment his chances of survival were approximately 65%.

19. The present value of Hardy Hacessa's lost earning capacity is $1,454,191.

20. The present value of Hardy Hacessa's loss of household services is $136,085.

21. The value of Hardy Hacessa's loss of enjoyment of life is $1,012,000.00. Plaintiff's expert testified that an average amount would be $10,000 a year.[1] That amount,

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1 The Court is mindful that expert testimony that attempts to quantify this number is not dispositive. The Court merely accepts the expert's average calculation per year as reasonable

taking into account Mr. Haceesa's life expectancy, would be $506,000.00. He Court finds that Mr. Haceesa's enjoyment of life was higher than most. There were over 700 people in attendance at his funeral. He was well known and well liked in his community. He was a young and happy man that enjoyed the satisfaction of a loving family, supportive and positive work environment and active athletic life in basketball. Therefore, the Court finds that Mr. Haceesa's enjoyment of life is well above average and values $1,012,000.

22. The value of the pain and suffering Hardy Hacessa underwent between April 25th and his death is $100,000.

23. The value of the emotional distress Hardy Hacessa underwent between April 25th and his death is $100,000.

24. The funeral expenses incurred to bury Hardy Hacessa were $5444.73.

25. As a result of Hardy's death, Beverly Hacessa has suffered loss of consortium, including the conjugal fellowship of husband and wife, right to take company of the other, society, cooperation, affection, guidance, and companionship. The value of this loss is $ 250,000.00.

26. As a result of Hardy's death, Shenoel Hacessa has suffered loss of parental guidance, counseling and companionship. The value of this loss is $250,000.00.

III. CONCLUSIONS OF LAW

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and determines the final number based upon the evidence presented in this case.

1. The United States of America is the proper Defendant in this case pursuant to 28 USC § 2679 (a) and (b).

2. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §1346.

3. Venue is proper in this Court pursuant to 28 U.S.C. §1402(b).

4. All administrative prerequisites for filing this suit set forth under 28 U.S.C. §2675 have been met.

5. Defendant is vicariously liable for the negligence of the agents and employees of NNMNH and the Indian Health Services, including the negligence of Nurse Practitioner Rhodes and the administration of NNMNH.

6. Defendant did not possess or apply the knowledge, nor did it use the skill and ordinary care ordinarily used by reasonably well qualified healthcare providers practicing under similar circumstances, giving due consideration to the locality involved.

7. Defendant, its agents and employees were negligent in their care of Hardy Haceesa on April 25, 1998 in the following respects:

(a) failing to take an appropriate exposure and occupational history;

(b) failing to recognize that Mr. Haceesa's clinical presentation was consistent with hantavirus;

(c) failing to recognize that a blood test to determine whether Mr. Hacessa was suffering from hantavirus should have been sent to UNMH;

(d) failing to recognize that Mr. Haceesa should have been admitted to NNMNH pending the results of a blood test to rule out hantavirus;

(e) failing to recognize that Mr. Haceesa's clinical presentation was not consistent with bronchitis,

(f) failing to recognize that they were not qualified to assess whether or not Mr. Haceesa was suffering from hantavirus and that they should have sought the advise of a healthcare provider who was so qualified;

(g) failing to make any effort to see to it that the personnel charged with evaluating potential hantavirus patients in its NNMNH emergency room were properly trained or educated as to the diagnosis and treatment of such patients; and

(h) failing to establish appropriate protocols in the management and assessment of patients presenting with symptoms of hantavirus.

8. Defendant's negligence, as set forth above, proximately caused the loss of the 65% chance of survival that Mr. Haceesa would have had with proper diagnosis and treatment.

9. Under New Mexico law, and, in particular, *Alberts v. Schultz*, 975 P.2d 1279 (NM 1999), Plaintiffs are entitled to recover damages in an amount directly proportional to the lost chance of survival for Hardy Hacessa that was the result of the defendant's negligence, which is 65%.

10. Under New Mexico law, and in particular, *Lujan v. Healthsouth Rehabilitation Corp.*, 902 P.2d 1025 (NM 1995), the negligence of the defendant is successive, and not concurrent

with, any negligence of San Juan Regional Medical Center on April 27th and 28th, 1998.

11. Neither is the defendant jointly liable with San Juan Regional Medical Center. Under New Mexico law, and in particular *Lujan*, 902 P.2d at 1029-30, *Lewis v. Samson*, 992 P.2d 282, 293 (N.M. Ct. App. 1999) and NMSA 1978, §41-3A-1(D) (1987), successive tort feasors are simply liable for the entire enhancement if proximately caused by their negligence.

12. The New Mexico cap on damages under the New Mexico Malpractice Act does not apply in this case. The cap only applies to negligence by a "healthcare provider," which is defined as "a person, corporation, organization, facility or institution licensed or certified by this State to provide healthcare or professional services as a doctor or medicine, hospital, out-patient healthcare facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant." NMSA §41-5-3(A). Plaintiffs' claims against the hospital administrators who elected to provide no training to Nurse Rhodes, as well as their claims of negligence against Nurse Rhodes, are not capped under the statute.

13. The total amount of damages to be awarded to Plaintiffs, according to the Conclusions of Law set forth above is $ 3,307,720.73, less 35 percent, for a total of $2,150,018.47.

14. The Court declines to aggregate the damages amount. Plaintiffs argue that there are aggravating circumstances surrounding the defendant's negligence and therefore that the damages award should be enhanced pursuant to §41-2-3, NMSA 1978. Plaintiffs argue that the defendant did absolutely nothing to educate its agents and employees as to how to recognize and deal with the expected, known and deadly threat of hantavirus in light of the fact that NNMNH is in the geographic center of the world for this disease, that a renewed outbreak was publicized, and that

Hardy and his wife both raised concerns that he might be suffering from the disease (although this is contested), and that the disease is so deadly. Plaintiffs requested a $1.33 million enhancement. However, the Court finds that the claims made by plaintiffs are reflected in the amount already awarded to plaintiffs as compensatory damages. Therefore, the Court will not enhance the award.

15. Pursuant to the Local Rules of this Court, plaintiffs are to submit a cost bill within 30 days of the date of entry of this Judgment. Plaintiffs are also entitled to post-judgment interest.

IV. RELIEF

Plaintiffs are hereby awarded $2,150,018.47 in compensatory damages against the United States, plus post-judgement interest and Plaintiffs' reasonable costs in amounts to be later determined.

Dated this 20th day of June, 2001.

MARTHA VAZQUEZ
UNITED STATES DISTRICT
JUDGE

III. ORDER ON REHEARING:

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BEVERLY HACEESA, Individually, and
FIRST FINANCIAL TRUST COMPANY,
as Conservator for SHENOEL HACEESA,
A Minor,

Plaintiffs-Appellees,

vs. No. 01-2252
(D.C. No. CIV-99-0060 MV/RLP)

UNITED STATES OF AMERICA,

Defendant - Appellant.

ORDER
Filed November 26, 2002

Before EBEL, MCKAY and BRISCOE, Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of
Court
By: Deputy Clerk

IV. STATUTES INVOLVED IN THE CASE:

UNITED STATES STATUTES:

28 U.S.C. §1346(b)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2401(b)

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. §2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. §2675(a)

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

NEW MEXICO STATUTES:

N.M. Stat. §41-5-3

Definitions

As used in the Medical Malpractice Act [this article]:

A. "health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care or professional services as a doctor of medicine, hospital, outpatient health care facility, doctor of osteopathy, chiropractor, podiatrist, nurse anesthetist or physician's assistant;

B. "insurer" means an insurance company engaged in writing health care provider malpractice liability insurance in this state;

C. "malpractice claim" includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death; "malpractice claim" does not include a cause of action arising out of the driving, flying or non-medical acts involved in the operation, use or maintenance of a vehicular or aircraft

ambulance;

D. "medical care and related benefits" means all reasonable medical, surgical, physical rehabilitation and custodial services and includes drugs, prosthetic devices and other similar materials reasonably necessary in the provision of such services;

E. "patient" means a natural person who received or should have received health care from a licensed health care provider, under a contract, express or implied; and
F. "superintendent" means the superintendent of insurance of this state.

N.M. Stat. §41-5-5

Qualifications

A. To be qualified under the provisions of the Medical Malpractice Act [this article], a health care provider shall:

(1) establish its financial responsibility by filing proof with the superintendent that the health care provider is insured by a policy of malpractice liability insurance issued by an authorized insurer in the amount of at least two hundred thousand dollars ($200,000) per occurrence or for an individual health care provider, excluding hospitals and outpatient health care facilities, by having continuously on deposit the sum of six hundred thousand dollars ($600,000) in cash with the superintendent or such other like deposit as the superintendent may allow by rule or regulation; provided that in the absence of an additional deposit or policy as required by this subsection, the deposit or policy shall provide coverage for not more than three separate occurrences; and

(2) pay the surcharge assessed on health care providers by the superintendent pursuant to Section 41-5-25 NMSA

1978.

B. For hospitals or outpatient health care facilities electing to be covered under the Medical Malpractice Act, the superintendent shall determine, based on a risk assessment of each hospital or outpatient health care facility, each hospital's or outpatient health care facility's base coverage or deposit and additional charges for the patient's compensation fund. The superintendent shall arrange for an actuarial study, as provided in Section 41-5-25 NMSA 1978.

C. A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it.

N.M. Stat. §41-5-6

Limitation of recovery

A. Except for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence. In jury cases, the jury shall not be given any instructions dealing with this limitation.

B. The value of accrued medical care and related benefits shall not be subject to the six
hundred thousand dollar ($600,000) limitation.

C. Monetary damages shall not be awarded for future medical expenses in malpractice claims.

D. A health care provider's personal liability is limited to two hundred thousand dollars ($200,000) for monetary damages and medical care and related benefits as provided in Section

41-5-7 NMSA 1978. Any amount due from a judgment or settlement in excess of two hundred thousand dollars ($200,000) shall be paid from the patient's compensation fund, as provided in Section 41-5-25 NMSA 1978.

E. For the purposes of Subsections A and B of this section, the six hundred thousand dollar ($600,000) aggregate amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall apply only to malpractice occurring on or after April 1, 1995.

N.M. Stat. §41-5-7

A. In all malpractice claims where liability is established, the jury shall be given a special interrogatory asking if the patient is in need of future medical care and related benefits. No inquiry shall be made concerning the value of future medical care and related benefits, and evidence relating to the value of future medical care shall not be admissible. In actions upon malpractice claims tried to the court, where liability is found, the court's findings shall include a recitation that the patient is or is not in need of future medical care and related benefits.

B. Except as provided in Section 41-5-10 NMSA 1978, once a judgment is entered in favor of a patient who is found to be in need of future medical care and related benefits or a settlement is reached between a patient and health care provider in which the provision of medical care and related benefits is agreed upon, and continuing as long as medical or surgical attention is reasonably necessary, the patient shall be furnished with all medical care and related benefits directly or indirectly made necessary by the health care provider's malpractice, subject to a semi-private room limitation in the event of hospitalization, unless the patient refuses to allow them to be so furnished.

C. Awards of future medical care and related benefits shall not be subject to the six hundred thousand dollar ($600,000) limitation imposed in Section 41-5-6 NMSA 1978.

D. Payment for medical care and related benefits shall be made as expenses are incurred.

E. The health care provider shall be liable for all medical care and related benefit payments until the total payments made by or on behalf of it for monetary damages and medical care and related benefits combined equals two hundred thousand dollars ($200,000), after which the payments shall be made by the patient's compensation fund.

F. This section shall not be construed to prevent a patient and a health care provider from entering into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.

G. The court in a supplemental proceeding shall estimate the value of the future medical care and related benefits reasonably due the patient on the basis of evidence presented to it. That figure shall not be included in any award or judgment but shall be included in the record as a separate court finding.

H. A judgment of punitive damages against a health care provider shall be the personal liability of the health care provider. Punitive damages shall not be paid from the patient's compensation fund or from the proceeds of the health care provider's insurance contract unless the contract expressly provides coverage. Nothing in Section 41-5-6 NMSA 1978 precludes the award of punitive damages to a patient. Nothing in this subsection authorizes the imposition of liability for punitive damages on a derivative basis where that imposition would not be otherwise authorized by law.

N.M. Stat. §41-5-14

A. The New Mexico medical review commission is created. The function of the New Mexico medical review commission is to provide panels to review all malpractice claims against health care providers covered by the Medical Malpractice Act [this article].

B. Those eligible to sit on a panel shall consist of health care providers licensed pursuant to New Mexico law and residing in New Mexico and the members of the state bar.

C. Cases which a panel will consider include all cases involving any alleged act of malpractice occurring in New Mexico by health care providers qualified under the Medical Malpractice Act.

D. An attorney shall submit a case for the consideration of a panel, prior to filing a complaint in any district court or other court sitting in New Mexico, by addressing an application, in writing, signed by the patient or his attorney, to the director of the medical review commission.

E. The director of the medical review commission will be an attorney appointed by and serving at the pleasure of the chief justice of the New Mexico supreme court.

F. The chief justice shall set the director's salary and report the same to the superintendent in his capacity as custodian of the patient's compensation fund.

N.M. Stat. §41-5-15

A. No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered.

B. This application shall contain the following:

(1) a brief statement of the facts of the case, naming the persons involved, the dates and the circumstances, so far as they are known, of the alleged act or acts of malpractice; and

(2) a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application, and, for the purposes of its consideration of the matter only, waiving any claim of privilege as to the contents of those records. Nothing in that statement shall in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

N.M. Stat. §41-5-19

A. The district court from which final judgment issues shall have continuing jurisdiction in cases where medical care and related benefits are awarded pursuant to Section 7 [41-5-7 NMSA 1978].

B. In all cases where the patient's continued need of such benefits, or the degree to which such benefits are needed is challenged at a point in time after a judgment is entered, the court, sitting without a jury, shall determine whether such need continues to exist and the extent of such need.

C. Whenever a patient petitions the district court for an increase in medical care and related benefits, the petition shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character and motions for preliminary injunctions filed pursuant to Rules 65, 66, N.M.R. Civ. P. [Rules 1-065, 1-066 NMRA].

D. The health care provider shall have the burden of proving that the patient's need for benefits has subsided or abated, or that medical care and related benefits are not reasonably necessary, which it shall establish by clear and convincing evidence. The patient shall have the burden of proving that his need for medical care and related benefits has increased, which he shall establish by a preponderance of the evidence.

N.M. Stat. §41-5-23

In any malpractice claim where the panel has determined that the acts complained of were or reasonably might constitute malpractice and that the patient was or may have been injured by the act, the panel, its members, the director and the professional association concerned will cooperate fully with the patient in retaining a physician qualified in the field of medicine involved, who will consult with, assist in trial preparation and testify on behalf of the patient, upon his payment of a reasonable fee to the same effect as if the physician had been engaged originally by the patient.

V. OTHER MATERIAL THE PETITIONERS BELIEVE IS ESSENTIAL TO UNDERSTANDING THE PETITION:

CLAIMS FOR DAMAGE, INJURY, OR DEATH

Form Approved
OMB NO.
1105-0008
Expires 3-31-91

---

1. Submit To Appropriate Federal Agency:

   INDIAN HEALTH SERVICES

2. Name, Address of claimant and claimant's personal representative, if any.

   Beverly Haceesa
   P.O. Box 3153
   Farmington, NM 87501

3. TYPE OF EMPLOYMENT

   Civilian

4. DATE OF BIRTH

   07-17-74

5. MARITAL STATUS

   Married

6. DATE AND DAY OF ACCIDENT

   04-25-98

7. TIME (A.M. OR P.M.)

8:39 p.m.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

Hardy Haceesa presented at the Northern Navajo Medical Center on 04-25-98 at approximately 8:39 p.m. with chest discomfort, difficulty breathing, fever, generalized aches and pain. The patient reported "it may be related to entering a trailer with mice", ... could it be hantavirus. The Nurse Practitioner attending Mr. Haceesa made no follow-up to this report. Mr. Haceesa was diagnosed with bronchitis and sent home. A simple blood test to determine the possibility of hantavirus was not performed, even though this is an area of the Country where more cases of hantavirus have been diagnosed than anywhere else. The warning signs (i.e., low platelet counts, fever, aches, etc.) were not pursued. Mr. Haceesa was not seen by a physician. He died of hantavirus three (3) days later.

9. PROPERTY DAMAGE

Not applicable

10. PERSONAL INJURY/WRONGFUL DEATH

State Nature And Extent Of Each Injury Or Cause Of Death, Which Forms The Basis Of The Claim. If Other Than Claimant, State Name Of Injured Person Or Decedent.

Hardy Haceesa died due to failure to properly diagnose and treat. Beverly Haceesa, his wife, makes a claim

for loss of spousal support, loss of consortium, loss of love and affection, emotional distress and mental anguish.

11. WITNESSES

NAME ADDRESS (Number, street, city, State, and Zip Code)

Jesse and Howard Haceesa
P.O. Box 3612, Farmington, NM 87499

S. Rhodes, Cert. Nurse Practitioner
Northern Navajo Medical Center, Shiprock, NM

12. AMOUNT OF CLAIM (in dollars)

a. Property Damage: -0-

b. Personal Injury: $ 4,000,000.00

c. Wrongful Death: Same As Personal Injury

d. Total (Failure To Specify May Cause Forfeiture Of Your Rights: $ 4,000,000.00

I Certify That The Amount Of Claim Covers Only Damages And Injuries Caused By The Accident Above and Agree To Accept Said Amount In Full Satisfaction And Final Settlement Of This Claim

13a. SIGNATURE OF CLAIMANT

BEVERLY HACEESA

13b. Phone Number of Signatory

14. DATE OF CLAIM

07-02-98

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2000. Plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not ore than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-108 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable PRESCRIBED BY DEPT. OF JUSTICE

***

CLAIMS FOR DAMAGE, INJURY, OR DEATH

Form Approved
OMB NO.
1105-0008
Expires 3-31-91

---

1. Submit To Appropriate Federal Agency:

   INDIAN HEALTH SERVICES

2. Name, Address of claimant and claimant's personal representative, if any.

   SHENOEL HACEESA
   c/o Sheldon Wright, Conservator
   First Financial Trust
   8100 Mountain Road, N.E., Albuquerque, NM 87110

3. TYPE OF EMPLOYMENT

   Civilian

4. DATE OF BIRTH

   07-17-74

5. MARITAL STATUS

   Married

6. DATE AND DAY OF ACCIDENT

   04-25-98

7. TIME (A.M. OR P.M.)

   8:39 p.m.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

Hardy Haceesa presented at the Northern Navajo Medical Center on 04-25-98 at approximately 8:39 p.m. with chest discomfort, difficulty breathing, fever, generalized aches and pain. The patient reported "it may be related to entering a trailer with mice", could it be hantavirus. The Nurse Practitioner attending Mr. Haceesa made no follow-up to this report. Mr. Haceesa was diagnosed with bronchitis and sent home. A simple blood test to determine the possibility of hantavirus was not performed, even though this is an area of the Country where more cases of hantavirus have been diagnosed than anywhere else. The warning signs (i.e., low platelet counts, fever, aches, etc.) were not pursued. Mr. Haceesa was not seen by a physician. He died of hantavirus three (3) days later.

9. PROPERTY DAMAGE

Not applicable

10. PERSONAL INJURY/WRONGFUL DEATH

State Nature And Extent Of Each Injury Or Cause Of Death, Which Forms The Basis Of The Claim. If Other Than Claimant, State Name Of Injured Person Or Decedent.

Hardy Haceesa died due to failure to properly diagnose and treat. Shenoel Haceesa, his four (4) year old daughter, lost her father and hereby makes a claim for loss of parental guidance and support; loss of his love, affection, emotional distress and mental anguish.

11. WITNESSES

NAME ADDRESS (Number, street, city, State, and Zip Code)

Jesse and Howard Haceesa
P.O. Box 3612, Farmington, NM 87499

S. Rhodes, Cert. Nurse Practitioner
Northern Navajo Medical Center, Shiprock, NM

12. AMOUNT OF CLAIM (in dollars)

a. Property Damage: -0-

b. Personal Injury: $ 4,000,000.00

c. Wrongful Death: Same As Personal Injury

d. Total (Failure To Specify May Cause Forfeiture Of Your Rights: $ 4,000,000.00

I Certify That The Amount Of Claim Covers Only Damages And Injuries Caused By The Accident Above and Agree To Accept Said Amount In Full Satisfaction And Final Settlement Of This Claim

13a. SIGNATURE OF CLAIMANT

SHELDON WRIGHT

13b. Phone Number of Signatory

(505) 265-8466

14. DATE OF CLAIM

07-02-98

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2000. Plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not ore than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-108 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable PRESCRIBED BY DEPT. OF JUSTICE

***

CLAIMS FOR DAMAGE, INJURY, OR DEATH

Form Approved
OMB NO.
1105-0008
Expires 3-31-91

---

1. Submit To Appropriate Federal Agency:

   INDIAN HEALTH SERVICES

2. Name, Address of claimant and claimant's personal representative, if any.

   ESTATE OF HARDY HACEESA
   c/o Beverly Haceesa, Personal Representative
   P.O. Box 3153
   Farmington, NM 87501

3. TYPE OF EMPLOYMENT

   Civilian

4. DATE OF BIRTH

   07-17-74

5. MARITAL STATUS

   Married

6. DATE AND DAY OF ACCIDENT

   04-25-98

7. TIME (A.M. OR P.M.)

8:39 p.m.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof) (Use additional pages if necessary.)

Hardy Haceesa presented at the Northern Navajo Medical Center on 04-25-98 at approximately 8:39 p.m. with chest discomfort, difficulty breathing, fever, generalized aches and pain. The patient reported "it may be related to entering a trailer with mice", ... could it be hantavirus. The Nurse Practitioner attending Mr. Haceesa made no follow-up to this report. Mr. Haceesa was diagnosed with bronchitis and sent home. A simple blood test to determine the possibility of hantavirus was not performed, even though this is an area of the Country where more cases of hantavirus have been diagnosed than anywhere else. The warning signs (i.e., low platelet counts, fever, aches, etc.) were not pursued. Mr. Haceesa was not seen by a physician. He died of hantavirus three (3) days later.

9. PROPERTY DAMAGE

Not applicable

10. PERSONAL INJURY/WRONGFUL DEATH

State Nature And Extent Of Each Injury Or Cause Of Death, Which Forms The Basis Of The Claim. If Other Than Claimant, State Name Of Injured Person Or Decedent.

Hardy Haceesa died due to failure to properly diagnose and treat. The Estate of Hardy Haceesa makes a claim for loss of enjoyment of life, pain and suffering, emotional distress and mental anguish.

11. WITNESSES

NAME ADDRESS (Number, street, city, State, and Zip Code)

Jesse and Howard Haceesa
P.O. Box 3612, Farmington, NM 87499

S. Rhodes, Cert. Nurse Practitioner
Northern Navajo Medical Center, Shiprock, NM

12. AMOUNT OF CLAIM (in dollars)

a. Property Damage: -0-

b. Personal Injury: $ 1,000,000.00

c. Wrongful Death: $ 4,000,000.00

d. Total (Failure To Specify May Cause Forfeiture Of Your Rights): $ 5,000,000.00

I Certify That The Amount Of Claim Covers Only Damages And Injuries Caused By The Accident Above and Agree To Accept Said Amount In Full Satisfaction And Final Settlement Of This Claim

13a. SIGNATURE OF CLAIMANT

BEVERLY HACEESA

13b. Phone Number of Signatory

14. DATE OF CLAIM

10/26/98

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2000. Plus double the amount of damages sustained by the United States. (See 31 U.S.C. 3729.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not ore than $10,000 or imprisonment for not more than 5 years or both. (See 18 U.S.C. 287, 1001.)

95-108 NSN 7540-00-634-4046 STANDARD FORM 95 (Rev. 7-85)
Previous editions not usable PRESCRIBED BY DEPT. OF JUSTICE

***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEVERLY HACEESA, INDIVIDUALLY,
and FIRST FINANCIAL TRUST COMPANY,
As Conservator for SHENOEL HACEESA, A
Minor,

Plaintiffs,

vs. No. CIV 99-60 LH/RLP-ACE

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR MEDICAL NEGLIGENCE AND WRONGFUL DEATH

COME NOW Plaintiffs, by and through their attorneys, The Branch Law Firm (Turner W. Branch, Margaret Moses Branch and James P. Lyle) and offer the following as their Complaint against the Defendant herein:

1. Plaintiff Beverly Haceesa is a resident of the State of New Mexico, San Juan County.

2. Plaintiff First Financial Trust Company, as Conservator on behalf of Shenoel Haceesa, a minor, is a corporation within the State of New Mexico, County of Bernalillo.

3. First Financial Trust Company is the Court appointed Conservator of Shenoel Haceesa.

4. The acts and events complained of herein occurred in the State of New Mexico, San Juan County.

5. The Defendant United States of America operates the Indian Health Service, an agency of the government of the United States of America and, through it, owns and operates Northern New Mexico Navajo Hospital in Shiprock, New Mexico. The United States of America is the proper Defendant in this case pursuant to the provisions of 28 U.S.C. § 2679 (a) and (b).

6. Jurisdiction is proper in this Court pursuant to the provisions of 28 U.S.C. §1346.

7. Venue is proper in this Court pursuant to 28 U.S.C. §1402(b).

8. These claims were first submitted for agency consideration pursuant to 28 U.S.C. §2675(a), on July 2, 1998. More than six (6) months has passed since these claims were presented, without any agency resolution, and accordingly, Plaintiffs are entitled to treat the inaction of the Federal Government as a final denial of these claims pursuant to 28 U.S.C. §2675(b).

FACTUAL ALLEGATIONS

9. Plaintiffs hereby incorporate all claims as set forth in Paragraphs 1 through 8 above as if fully set forth herein.

10. In April, 1998, Hardy Haceesa was a twenty-three (23) year old male, father of Shenoel Haceesa and husband of Beverly Haceesa.

11. He was employed as a construction worker and in the course of his employment was routinely required to work in structures, buildings and houses where it was possible, if

not likely, that he could be exposed to deer mice.

12. On April 25, 1998, at approximately 8:39 a.m. Hardy Haceesa and Beverly Haceesa went to the Northern New Mexico Navajo Hospital because Hardy was complaining of chest discomfort, difficulty breath, fever and generalized aches and pains.

13. The medical records from Northern New Mexico Navajo Hospital (NNMNH) indicate that Mr. Haceesa had a sore throat and nausea and that he was concerned that his symptoms "may be related to entering trailer w/mice".

14. Despite this report by Mr. Haceesa to S. Rhodes, the nurse practitioner treating Mr. Haceesa, nothing was done by the staff and personnel at the hospital to evaluate Mr. Haceesa for hantavirus.

15. The medical records indicate that his chest x-ray was clear and his EKG showed no changes.

16. The records also indicate Mr. Haceesa had a low platelet count (111,000), low potassium, fever and an overall poor general appearance.

17. The medical records indicate that Mr. Haceesa was diagnosed with bronchitis, prescribed erythromycin and ibuprofen, sent home and told to return to the local clinic at DZ for a recheck in two (2) days.

18. During his visit to the hospital, Mr. Haceesa was not seen or diagnosed by an accredited physician.

19. During his visit, a blood test to determine the possibility of hantavirus was not taken and sent to the University of New Mexico Hospital, despite the report of rodent exposure and despite the fact that this is an area of the

country where more cases of hantavirus have been diagnosed than anywhere else.

20. Mr. Haceesa died of hantavirus three (3) days later on April 28, 1998.

21. The failure of the agents and employees of NNMNH to properly diagnose and manage Mr. Haceesa' hantavirus was the cause of his death.

22. Defendant is vicariously liable for the negligence of the agents and employees of NNMNH and the Indian Health Services.

COUNT I: CLAIMS AGAINST DEFENDANT UNITED STATES OF AMERICA

23. Plaintiffs hereby incorporate all claims as set forth in Paragraphs 1 through 22 above as if fully set forth herein.

24. Defendant, its agents, agencies and employees, breached their duty of care and were negligent in failing to establish appropriate protocols in the management and assessment of patients presenting with symptoms of hantavirus.

25. Defendant, its agents, agencies and employees, breached their duty of care and were negligent in failing to take an appropriate history from Hardy or Beverly Haceesa.

26. Defendant, its agents, agencies and employees were negligent in their care of Hardy Haceesa on April 25, 1998 in the following respects:

(a) failing to take an appropriate exposure and occupational history;

(b) failing to recognize that Hardy's clinical presentation was consistent with hantavirus;

(c) failing to recognize that a blood test to determine whether Hardy was suffering from hantavirus should have been sent to UNMH;

(d) failing to recognize that Hardy should have been admitted to the hospital pending the results of a blood test to rule out hantavirus;

(e) failing to recognize that Hardy's clinical presentation was not consistent with bronchitis, and

(f) failing to recognize that they were not qualified to assess whether or not Hardy was suffering from hantavirus and that they should have sought the advise of a healthcare provider who was so qualified.

27. Defendant's negligence, as set forth above, proximately caused, directly and/or indirectly, Hardy Haceesa's pain, suffering and death.

DAMAGES

28. Plaintiffs hereby incorporate all claims as set forth in Paragraphs 1 through 27 above as if fully set forth herein.

29. Defendant's negligence, as set forth above, caused Plaintiffs to suffer the following elements of damages:

(a) Funeral expenses;

(b) Lost of past, present and future earnings;

(c) Emotional distress;

(d) Loss of household services;

(e) Loss of consortium (including the conjugal fellowship of husband and wife, right to take company of the other, society, cooperation, affection, guidance, and companionship);

(f) Loss of parental guidance, counseling and companionship;

(g) Severe shock as a result of the direct emotional impact caused by the contemporaneous sensory perception of these acts and events; and

(h) Physical manifestation of their emotional injuries.

WHEREFORE Plaintiffs First Financial Trust Company and Beverly Haceesa respectfully request an award of monetary damages in an amount reasonably necessary to compensate them for their injuries and damages, for pre- and post-judgment interest, costs, and such further relief as the Court deems just and proper.

Respectfully submitted,
THE BRANCH LAW FIRM
James P. Lyle
Turner W. Branch
Margaret Moses Branch
2025 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
(505) 243-3500
(505) 243-3534

***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEVERLY HACEESA, INDIVIDUALLY,
and AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF HARDY HACEESA,
and FIRST FINANCIAL TRUST COMPANY,
As Conservator for SHENOEL HACEESA,
A Minor,

Plaintiffs,

vs. No. CIV 99-60 LH/RLP-ACE

THE UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT FOR MEDICAL NEGLIGENCE AND WRONGFUL DEATH

COME NOW Plaintiffs, by and through their attorneys, The Branch Law Firm (Turner W. Branch, Margaret Moses Branch and James P. Lyle) and offer the following as their Amended Complaint against the Defendant herein:

1. Plaintiff Beverly Haceesa is a resident of the State of New Mexico, San Juan County. Plaintiff Beverly Haceesa is the Personal Representative of Hardy Haceesa, her former husband who is now deceased.

2. Plaintiff First Financial Trust Company, as Conservator on behalf of Shenoel Haceesa, a minor, is a corporation within the State of New Mexico, County of Bernalillo.

3. First Financial Trust Company is the Court appointed Conservator of Shenoel Haceesa.

4. The acts and events complained of herein occurred in the State of New Mexico, San Juan County.

5. The Defendant United States of America operates the Indian Health Service, an agency of the government of the United States of America and, through it, owns and operates Northern New Mexico Navajo Hospital in Shiprock, New Mexico. The United States of America is the proper Defendant in this case pursuant to the provisions of 28 USC § 2679 (a) and (b).

6. Jurisdiction is proper in this Court pursuant to the provisions of 28 U.S.C. §1346.

7. Venue is proper in this Court pursuant to 28 U.S.C. §1402(b).

8. The claims of Beverly Haceesa, individually, and Shenoel Haceesa were first submitted for agency consideration pursuant to 28 U.S.C. § 2675 (a) on July 6, 1998. The claims on behalf of Hardy Haceesa's Estate were first presented to the United States Government on October 30, 1998. More than six (6) months has passed since these claims were presented, without any agency resolution, and accordingly, Plaintiffs are entitled to treat the inaction of the Federal Government as a final denial of these claims pursuant to 28 U.S.C. §2675(b).

FACTUAL ALLEGATIONS

9. Plaintiffs hereby incorporate all claims as set forth in Paragraphs 1 through 8 above as if fully set forth herein.

10. In April, 1998, Hardy Haceesa was a twenty-three (23) year old male, father of Shenoel Haceesa and husband of

Beverly Haceesa.

11. He was employed as a construction worker and in the course of his employment was routinely required to work in structures, buildings and houses where it was possible, if not likely, that he could be exposed to deer mice.

12. On April 25, 1998, at approximately 8:39 a.m. Hardy Haceesa and Beverly Haceesa went to the Northern New Mexico Navajo Hospital because Hardy was complaining of chest discomfort, difficulty breath, fever and generalized aches and pains.

13. The medical records from Northern New Mexico Navajo Hospital (NNMNH) indicate that Mr. Haceesa had a sore throat and nausea and that he was concerned that his symptoms "may be related to entering trailer w/mice".

14. Despite this report by Mr. Haceesa to S. Rhodes, the nurse practitioner treating Mr. Haceesa, nothing was done by the staff and personnel at the hospital to evaluate Mr. Haceesa for hantavirus.

15. The medical records indicate that his chest x-ray was clear and his EKG showed no changes.

16. The records also indicate Mr. Haceesa had a low platelet count (111,000), low potassium, fever and an overall poor general appearance.

17. The medical records indicate that Mr. Haceesa was diagnosed with bronchitis, prescribed erythromycin and ibuprofen, sent home and told to return to the local clinic at DZ for a recheck in two (2) days.

18. During his visit to the hospital, Mr. Haceesa was not seen or diagnosed by an accredited physician.

19. During his visit, a blood test to determine the possibility of hantavirus was not taken and sent to the University of New Mexico Hospital, despite the report of rodent exposure and despite the fact that this is an area of the country where more cases of hantavirus have been diagnosed than anywhere else.

20. Mr. Haceesa died of hantavirus three (3) days later on April 28, 1998.

21. The failure of the agents and employees of NNMNH to properly diagnose and manage Mr. Haceesa' hantavirus was the cause of his death.

22. Defendant is vicariously liable for the negligence of the agents and employees of NNMNH and the Indian Health Services.

COUNT I: CLAIMS AGAINST DEFENDANT UNITED STATES OF AMERICA

23. Plaintiffs hereby incorporate all claims as set forth in Paragraphs 1 through 22 above as if fully set forth herein.

24. Defendant, its agents, agencies and employees, breached their duty of care and were negligent in failing to establish appropriate protocols in the management and assessment of patients presenting with symptoms of hantavirus.

25. Defendant, its agents, agencies and employees, breached their duty of care and were negligent in failing to take an appropriate history from Hardy or Beverly Haceesa.

26. Defendant, its agents, agencies and employees were negligent in their care of Hardy Haceesa on April 25, 1998 in the following respects:

(a) failing to take an appropriate exposure and occupational history;

(b) failing to recognize that Hardy's clinical presentation was consistent with hantavirus;

(c) failing to recognize that a blood test to determine whether Hardy was suffering from hantavirus should have been sent to UNMH;

(d) failing to recognize that Hardy should have been admitted to the hospital pending the results of a blood test to rule out hantavirus;

(e) failing to recognize that Hardy's clinical presentation was not consistent with bronchitis, and

(f) failing to recognize that they were not qualified to assess whether or not Hardy was suffering from hantavirus and that they should have sought the advise of a healthcare provider who was so qualified.

27. Defendant's negligence, as set forth above, proximately caused, directly and/or indirectly, Hardy Haceesa's pain, suffering and death.

II. DAMAGES

28. Plaintiffs hereby incorporate all claims as set forth in Paragraphs 1 through 27 above as if fully set forth herein.

29. Defendant's negligence, as set forth above, caused Plaintiffs to suffer the following elements of damages:

(a) Funeral expenses;

(b) Lost of past, present and future earnings;

(c) Emotional distress;

(d) Loss of household services;

(e) Loss of consortium (including the conjugal fellowship of husband and wife, right to take company of the other, society, cooperation, affection, guidance, and companionship);

(f) Loss of parental guidance, counseling and companionship;

(g) Severe shock as a result of the direct emotional impact caused by the contemporaneous sensory perception of these acts and events; and

(h) Physical manifestation of their emotional injuries;

(i) Pain and suffering and emotional distress caused to Hardy Haceesa prior to his death;

(j) Loss of enjoyment of life to Hardy Haceesa.

III. CLAIMS FOR LOSS OF CONSORTIUM

30. Plaintiff incorporates herein all allegations contained in Paragraphs 1 through 29 above as if fully set forth herein.

31. As a direct and proximate result of the conduct of the Defendants, their agents and employees, Beverly Hacessa,

individually, as the spouse of Hardy Haceesa, has suffered emotional distress caused by the loss of conjugal fellowship of husband and wife, the right of each to take the company of the other, society, cooperation, affection, guidance and companionship (loss of consortium).

32. Beverly Haceesa's individual claims for loss of consortium are so related to the Claims brought on behalf of the Estate of Hardy Haceesa as set forth herein that they form a part of the same case or controversy under Article III of the United States Constitution. Accordingly, this Court has jurisdiction over Beverly Haceesa's individual loss of consortium claims under 28 U.S.C. §1367.

WHEREFORE Plaintiffs First Financial Trust Company and Beverly Haceesa respectfully request an award of monetary damages in an amount reasonably necessary to compensate them for their injuries and damages, for pre- and post-judgment interest, costs, and such further relief as the Court deems just and proper.

Respectfully submitted,
THE BRANCH LAW FIRM
James P. Lyle
Turner W. Branch
Margaret Moses Branch
2025 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
(505) 243-3500
(505) 243-3534

Supreme Court, U.S.
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(2)

No. 02-1640

In the Supreme Court of the United States

BEVERLY HACEESA, INDIVIDUALLY, AND FIRST FINANCIAL TRUST COMPANY, AS CONSERVATOR FOR SHENOEL HACEESA, A MINOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

23 pp

QUESTIONS PRESENTED

1. Whether, under the Federal Tort Claims Act (FTCA), the United States, in administering a hospital in New Mexico, should receive the same protection under the state medical malpractice liability cap as qualifying private hospitals.

2. Whether the court of appeals' reading of New Mexico law on the apportionment of damages between successive tortfeasors was fundamentally unfair and deprived petitioners of their property without due process of law.

3. Whether the district court had jurisdiction to consider claims of the decedent's estate that the estate did not bring before the court within the time limits set by the FTCA.

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1.1 to 1.26) is reported at 309 F.3d 722. The opinions of the district court (Pet. App. 1.27 to 1.33, 1.34 to 1.39, 1.40 to 1.52) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2002. A petition for rehearing was denied on November 26, 2002 (Pet. App. 1.53). The petition for a writ of certiorari was filed on February 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Hardy Haceesa, aged 23, died on April 28, 1998, from Hantavirus Pulmonary Syndrome (HPS), a rare disease caused by inhaling airborne particles from the urine of infected mice. Three days earlier, on April 25, 1998, he had been seen by a doctor and nurse at the Northern New Mexico Navajo Hospital in Shiprock, New Mexico (Shiprock Hospital), owned and operated by the Indian Health Service (IHS), an agency of the U.S. Department of Health and Human Services (HHS). Those personnel failed to identify his condition as HPS. He was subsequently seen at a private hospital, San Juan Regional Medical Center (San Juan Hospital) on April 27 and on the morning of April 28. Mr. Haceesa died shortly after arrival at a third hospital, University of New Mexico Hospital. Pet. App. 1.40 to 1.41.

2. On July 2, 1998, petitioners Beverly Haceesa (Mr. Haceesa's wife) and Shenoel Haceesa (his daughter), filed administrative claims with the IHS seeking compensation for damages caused by the IHS's failure to detect the disease on April 25, 1998. The July 2 claim for Beverly Haceesa sought compensation for "loss of spousal support, loss of consortium, loss of love and affection, emotional distress and mental anguish." Pet. App. 1.66. On October 26, 1998, Beverly Haceesa filed an additional claim as personal representative for Hardy Haceesa's estate. The estate's claim sought compensation for "loss of enjoyment of life, pain and suffering, emotional distress and mental anguish." *Id.* at 1.73.

On January 15, 1999, petitioners brought the present action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680,

in the United States District Court for the District of New Mexico. Pet. App. 1.28, 1.76 to 1.77. At that time, the IHS had not finally denied the administrative claims, which it ultimately did on April 28, 1999. *Id.* at 1.28. On October 6, 1999, 161 days after the final denial of the administrative claim, counsel for the United States advised counsel for petitioners that the government would not object to an amendment of the complaint to include the claims of the estate. *Id.* at 1.22. On December 3, 1999, 219 days after the final denial, petitioners sought to file an amended complaint. *Id.* at 1.28.

The United States opposed the motion to amend the complaint on the ground that more than six months had elapsed between the IHS's final denial of the estate's claims and the estate's action on those claims in the district court. See 28 U.S.C. 2401(b) (providing that such claims shall be "forever barred"). On March 6, 2000, the district court granted in relevant part the motion to amend. Pet. App. 1.27 to 1.33. On April 20, 2000, *id.* at 1.18, petitioners filed their amended complaint,

which included the claims of the estate for "[p]ain and suffering and emotional distress caused to Hardy Haceesa prior to his death" and "[l]oss of enjoyment of life to Hardy Haceesa." *Id.* at 1.87.

3. The case was tried from April 2 to April 4, 2001. On June 20, 2001, District Judge Martha Vazquez found the United States liable for all of the damages resulting from Mr. Haceesa's loss of chance of survival, which the court determined to be 65%. Pet. App. 1.47. The court based its finding of liability on the failure of the nurse who treated Mr. Haceesa to meet the standard of care, and on the failure of the administrators of the hospital to train the nurse adequately. *Id.* at 1.49 to 1.51. The

court calculated total damages of $3,307,720.73, which, decreased by 35%, resulted in an award against the United States of $2,150,018.47. *Id.* at 1.51. A total of $500,000 of the damages ($325,000 after the 35% reduction) represented the claims of Mr. Haceesa's wife and daughter, *id.* at 1.48; the remainder represented the claims of the estate.

The United States did not appeal the finding of liability, but did appeal three issues concerning the damage award. It argued, first, that the plaintiffs were limited to a recovery of $600,000 by the New Mexico Medical Malpractice Act's cap on non-economic damages, N.M. Stat. Ann. § 41-5-6(A) (Michie 2002); second, that damages against the government should have been reduced because of the negligence of San Juan Hospital; and, third, that the claims of the estate were barred by 28 U.S.C. 2401(b) because they were not filed within six months of the agency's final denial of the estate's administrative claim.

The court of appeals ruled in favor of the United States on each of the three issues. First, it determined that the United States was covered by the New Mexico damages cap, holding that because an analogous suit against a private hospital would have been subject to the cap on recovery, the plaintiffs' suit against the government under the FTCA was also subject to the $600,000 cap. Pet. App. 1.3 to 1.12. Second, the court held that, although the harm caused by each of the two hospitals was "successive" as defined by New Mexico law, the case should be remanded to district court for findings on the loss of chance of survival caused by the government's medical negligence, excluding those resulting from the private hospital's negligence. *Id.* at 1.12 to 1.17. Third, the court of appeals ruled that because the estate had filed its suit over six months

after denial of its administrative claim, outside the time allowed by 28 U.S.C. 2401(b) of the FTCA, the estate's claims were barred. Pet. App. 1.17 to 1.22.

ARGUMENT

Petitioners ask this Court to grant plenary review and overturn all three of the court of appeals' rulings. They do not claim that the decision of the court of appeals conflicts with any prior decision of this Court. They do argue that the decision conflicts with the decisions of other circuits, but with one exception their arguments lack merit. Although petitioners do identify one issue of general importance raised by this case—the application of state law caps on recovery for medical malpractice to suits against the United States under the Federal Tort Claims Act—this case presents an unsatisfactory vehicle for resolving any question related to that issue. Further, the court of appeals was correct in each of its holdings. Accordingly, none of the questions petitioners present warrants review by this Court.

1. Petitioners first argue that the United States should not receive the protection of New Mexico's cap on damages for medical malpractice awards. Their argument is divided into two parts: first, that the court of appeals erred in concluding that the United States was in like circumstances with a private New Mexico hospital that would benefit from New Mexico's statutory cap on damages for medical malpractice; second, that the court of appeals erred in permitting the United States to "assert an affirmative defense which would not be available to the individual employee," Pet. 17.

a. The United States is in like circumstances with a private hospital that would receive the protection of New Mexico's statutory cap on damages for medical

malpractice. The relevant provision of the FTCA states that

> [t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. 2674. The relevant provision of New Mexico's Medical Malpractice Act states that

> [e]xcept for punitive damages and medical care and related benefits, the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice shall not exceed six hundred thousand dollars ($600,000) per occurrence.

N.M. Stat. Ann. § 41-5-6(A) (Michie 2002). The Act further requires that to qualify for its protections, a health care provider must (1) "establish its financial responsibility" by carrying malpractice insurance for at least $200,000 per incident (or keeping funds on deposit with the state); and (2) pay into the state's fund to cover awards of future medical expenses, which are not subject to the statutory cap on damages. *Id.* § 41-5-5(A) (giving requirements for qualification); see *id.* § 41-5-7 (governing payments of future medical expenses from the fund).

The United States, of course, neither carries malpractice insurance nor pays into state compensation funds. The courts of appeals that have applied 28 U.S.C. 2674 to statutes such as New Mexico's have concluded that neither difference is material. *Carter* v. *United States*, 982 F.2d 1141, 1143-1144 (7th Cir. 1992)

(Indiana); *Lozada* v. *United States*, 974 F.2d 986, 987-988 (8th Cir. 1992) (Nebraska); *Owen* v. *United States*, 935 F.2d 734, 737-738 (5th Cir. 1991) (Louisiana). Those courts have reasoned that the purposes of the statutory qualification requirements are to ensure that health care providers are able to pay judgments against them, and that they have contributed to the support of the state fund that pays the remainder of the judgments. The United States is able to pay any judgment against it; and, because the United States would not claim entitlement to indemnification from the state-sponsored fund, it is irrelevant that the United States does not pay into that fund. See *Carter*, 982 F.2d at 1143-1144; *Lozada*, 974 F.2d at 988; *Owen*, 935 F.2d at 737-738.

Petitioners claim that *Lozada* favors their position, because of language in that case stating that "the federal government is willing to meet the objectives of the Nebraska Act" analyzed by that case. Pet. 11 (quoting 974 F.2d at 989). They argue that among the objectives of New Mexico's Act are the state administrative process that plaintiffs must exhaust before bringing a medical malpractice action in state court; the procedure by which a plaintiff who prevails in that administrative process obtains assistance in locating an expert witness; and the continuing jurisdiction of the state courts over payments of future medical expenses. Pet. 10-12.[1]

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[1] Petitioners also claim (Pet. 11, 13-14) that the decision of the court of appeals in this case conflicts with the Tenth Circuit's own earlier decision of *Hill* v. *United States*, 81 F.3d 118 (1996). Read fairly, *Hill* supports the reasoning and result of the court of appeals in this case. See Pet. App. 1.6 (stating that *Hill* "endorsed" *Carter*, *Lozada*, and *Owen*, and noting *Hill*'s dictum, 81 F.3d at 121, that "where there is a specific cap on tort liability, the United States Government may benefit from this limit although it did not

Petitioners' apparent claim that these characteristics of New Mexico's statute would require the Eighth Circuit, following *Lozada*, to decide this case differently lacks merit. The state statutes at issue in *Carter*, *Lozada*, and *Owen* each contain provisions similar to those petitioners highlight in the New Mexico Act.[2] Yet none of these courts viewed the provisions as meriting discussion. The courts of appeals have not required an exact similarity of circumstances between the United States and any given private defendant, but have applied state law provisions, including damage caps, without regard to those aspects that have little or no application to the federal government in light of its unique characteristics. The courts of appeal are correct in their uniform view that 28 U.S.C. 2674 requires a search for "'*like* circumstances'—not '*identical*

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otherwise participate in the statutory scheme which provides the cap"). Further, even if *Hill* were inconsistent with the result in this case, that inconsistency would still not justify review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

[2] See La. Rev. Stat. Ann. § 40:1299.47.A(1) (West 2001 & Supp. 2003) (review by state administrative panel); *id.* § 40:1299.47.H (panel members as expert witnesses); *id.* § 40:1299.43.C (ongoing payment of future medical expenses); Neb. Rev. Stat. Ann. § 44-2840 (Michie 2000 & Supp. 2002) (review by panel); *id.* § 44-2844 (panel members as expert witnesses); Ind. Code Ann. § 16-9.5-9-1 (West 1992) (repealed 1993) (review by panel); *id.* § 16-9.5-9-9 (panel members as expert witnesses). Nebraska's and Indiana's statutes did not include a provision for ongoing payment of future medical expenses, and there are other minor differences among the statutes—all three appear to contemplate, for example, that panel members themselves shall serve as expert witnesses rather than directing the panel to assist plaintiffs in locating expert witnesses.

circumstances.'" *Carter*, 982 F.2d at 1144. No clarification of the law is required.

b. Petitioners further argue (Pet. 14-17) that the court of appeals erred by not requiring the United States to "prove that New Mexico hospitals are protected by the NMMMA when sued in *respondeat superior* for the negligence of employees who are not qualified under the Act." Pet. 15. Petitioners claim that the decision of the court of appeals therefore creates a circuit split with the Eighth Circuit's decision in *Knowles* v. *United States*, 91 F.3d 1147 (1996). It is true that the court of appeals in this case acknowledged it was departing from *Knowles*, citing Judge Beam's dissent in that case and praising its reasoning. Pet. App. 1.11 to 1.12. This case, however, does not present a good vehicle for resolving the arguable split among the circuits.

Knowles involved claims against several medical services specialists who the South Dakota Supreme Court had held on certification were not covered by that state's cap on recovery for medical malpractice. See 91 F.3d at 1149 (citing *Knowles* v. *United States*, 544 N.W.2d 183, 192 (S.D. 1996)). The Eighth Circuit reasoned not that a private hospital in South Dakota would not have received the same protection, but rather that the United States should not receive that protection because, under the FTCA, it had assumed the liability of the medical services specialists themselves. *Id.* at 1150 ("[I]f medical services specialists, individually, are not protected by the statute, neither is the United States shielded from the consequences of their negligence.").

The court of appeals in this case rejected that reasoning, holding that the position of the United States under the FTCA is like that of a private employer sued

in *respondeat superior*. Pet. App. 1.9 ("If 'private person,' § 1346(b), and 'private individual, § 2674, includes employers, then the recovery cap applies here because the private employer analogous to a government hospital is a private hospital."). It relied not only on the text of the FTCA, but also on the legislative history of that statute; the reasoning of other courts, including this Court's statement in *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995) that "[g]enerally, [FTCA] cases unfold much as cases do against other employers who concede *respondeat superior* liability," *id.* at 420; and the policy concern that Congress would not have wanted to expose the United States Treasury to state law suits from which the States have seen fit to protect private employers.

Although the divergence of the Eighth Circuit's reasoning in *Knowles* from that of the court of appeals in this case may ultimately lead to a conflict that would justify this Court's review, for three reasons this case is not a suitable vehicle for resolving any such conflict.

First, it is not clear that this case on its facts presents the question addressed in *Knowles*. The United States took the position in the district court and before the court of appeals that the employees here ("hospital administrators and a nurse," Pet. App. 1.4), were in fact covered by the New Mexico cap, because that cap refers by its terms to "the aggregate dollar amount recoverable by all persons for or arising from any injury or death to a patient as a result of malpractice," N.M. Stat. Ann. § 41-5-6(A). Although the court of appeals declined to rest its holding on that ground (Pet. App. 1.8) it did not reject it, and the United States adheres to its position. If that is correct, then even applying the analysis of *Knowles*, there is no conflict between the Eighth and the Tenth Circuits on the facts of this case.

Second, the holding of the court of appeals that the claims of the estate are time-barred would suffice to reduce the total damage award in this case below the $600,000 statutory cap, rendering the cap irrelevant. Although petitioners seek review on the time-bar question, it does not (as explained below) even arguably warrant review by this Court. This Court should therefore leave undisturbed the correct judgment of the court of appeals.

Third, it appears from the petition that petitioners do not really embrace the Eighth Circuit's view that the United States steps into the shoes of the employee, and is not liable like a private-sector employer sued under a *respondeat superior* theory. Instead, petitioners appear to concede that the United States is liable as an employer, but dispute whether a private employer would benefit from the state-law damages cap under analogous circumstances. That question neither implicates a circuit split nor merits this Court's plenary review.

Petitioners' argument starts with the premise that the court of appeals "did correctly admit that the *respondeat superior* liability of the United States under the FTCA is limited to that of a private employer under like circumstances." Pet. 15. Further, they contend that

> [n]o holding of this Court, and nothing in the language of the Federal Tort Claims Act, permits the United States, sued in *respondeat superior* as it must be, to assert an affirmative defense which would not be available to the individual employee. No New Mexico hospital sued for the negligence of its nurses or administrators has ever been granted the protection of the NMMMA.

Pet. 17. That is, petitioners' complaint is not that the Tenth Circuit, in contrast to the Eighth, assessed the liability of the United States by analogy to a private employer sued in *respondeat superior*, rather than by direct analogy to the employee. Instead, the complaint is that the Tenth Circuit misunderstood the New Mexico rule for private employers sued in a *respondeat superior* capacity. That claimed error in a federal court's interpretation of New Mexico law does not warrant review by this Court.[3]

2. Petitioners also argue that the court of appeals should not have remanded this case to the district court to determine what part of Mr. Haceesa's chance of survival was lost because of the actions of government personnel. Pet. 18–21. Two hospitals, one government and one private, failed to make the correct diagnosis. The court of appeals merely concluded that, under New Mexico law, the district court should allocate fault between the two hospitals and hold the United States liable only for its fault. Pet. App. 1.16 to 1.17.

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[3] Petitioners also seek to cast the court of appeals' holding as an allocation of the burden of proof on a factual issue, and criticize it for that reason. Pet. 15 ("The record is devoid of any attempt by the United States to meet its burden on this factual issue."); Pet. 17 ("[T]he United States should have the burden of establishing its entitlement to the protections of [the statutory cap]."). The court of appeals correctly concluded that the "like circumstances" inquiry under 28 U.S.C. 2674 was a legal one and not a factual one, and so there is no burden of proof to allocate. Pet. App. 1.9 (identifying the question as one of "statutory interpretation"). The court of appeals' brief remark that "the record * * * is totally inadequate *even* to establish Plaintiff's factual premise" (*id.* at 1.7 (emphasis added)), was a response in the alternative, preceded by the observation that the number of "private medical providers [who] voluntarily cho[o]se not to qualify as a qualified health care provider" is irrelevant. *Ibid.*

Petitioners object that this holding resulted from a theory different from that argued by the government. They call this result a "[n]ovel and [c]omplex '[s]urprise.'" Pet. 18. For this reason, petitioners say that the appellate court's holding "was, at least, fundamentally unfair to Petitioners, and, at most, a Due Process violation." Pet. 21.

Petitioners' argument lacks support in either the record or the law. As the court of appeals noted: "During trial, the Government attempted to prove that physicians at [San Juan Hospital—the non-government facility] were negligent in failing to accurately diagnose Haceesa's illness. The Government further argued that damages should be apportioned between it and San Juan [Hospital]." Pet. App. 1.12 to 1.13. The United States argued that, as a matter of New Mexico law, the district court should have classified the two treating hospitals as concurrent rather than successive tortfeasors, relying on Section 41-3A-1(A) rather than Section 41-3A-1(D). The court of appeals rejected the government's legal analysis, but agreed with the government's conclusion that damages should be apportioned between it and San Juan Hospital. The appellate court held that the apportionment of damages should be determined pursuant to Section 41-3A-1(D), which provides that "each tortfeasor 'is severally liable only for the distinct harm which that person proximately caused.'" Pet. App. 1.13. The court of appeals concluded that this was not logically a case in which the government should be held liable for all injury as "an original tortfeasor" under New Mexico law, since the initial injury was not caused by the government, but by hantavirus infection. *Id.* at 1.17.

Petitioners argue that once the court of appeals rejected the government's argument that it was a con-

current tortfeasor, the court was constrained to affirm. Pet. 19–20. Petitioners argue this view based on their mistaken conviction that the court of appeals was limited to considering only the legal theories advanced by the parties. As this Court has explained:

> When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.

Kamen v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); see *United States Nat'l Bank* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446 (1993). In this case, the United States properly presented the court of appeals with its claim that it should pay for only that part of the damages not caused by San Juan Hospital; the court identified and construed the governing law, and resolved the claim.

The approach of the court of appeals was proper even as a question of good judicial practice. Petitioners' argument that the court not only erred, but also violated due process of law, wholly lacks merit. Further, although petitioners sought rehearing by the court of appeals, the only hint towards their present claim of a constitutional violation was a brief footnote "question-[ing] whether this complex issue of first impression was properly raised *sua sponte* by the Court if [sic] for the first time on appeal." Pet. for Reh'g 11 n.3. Neither petitioners' constitutional claim nor their underlying claim of error in state law warrants this Court's review.

3. Petitioners argue finally (Pet. 21-26) that the court of appeals improperly rejected the claims of Hardy Haceesa's estate as barred by the statute

of limitations. The relevant statutory provision states that

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2401(b). This Court has said that in construing this language, which is part of the waiver of sovereign immunity effected by the FTCA, the courts should neither "take it upon [themselves] to extend the waiver beyond that which Congress intended" nor "assume the authority to narrow the waiver that Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979).

a. The court of appeals reasoned that because the estate's claim was finally denied on April 28, 1999, the estate was required to begin its action within six months of that date to avoid the bar, which it did not. Pet. App. 1.19. Petitioners object that the estate's claims should be permitted to relate back to their original complaint, filed on January 15. As the court of appeals concluded in response to this objection, even were the estate deemed to have filed its claims on January 15, those claims would still have been barred for failure to exhaust administrative remedies, as the IHS had not yet either actually or constructively denied them. See 28 U.S.C. 2675(a) (requiring that a claim either be actually denied by an agency or constructively denied by a delay of at least six months before "[a]n action shall * * * be instituted" under the FTCA);

McNeil v. *United States*, 508 U.S. 106, 110-113 (1993) (reading this language to require the dismissal of an action brought before exhaustion of administrative remedies, even though exhaustion occurs before "substantial progress has been made" in the litigation).

Petitioners reply (Pet. 23-26) that their original July 1998 administrative claims, fairly read, raise the estate's claims; and, therefore, that the six months required for constructive denial by 28 U.S.C. 2675(a) had passed before the filing of the original complaint. The court of appeals gave petitioners a full hearing on this point, discussed their claims at some length, Pet. App. 1.19 to 1.22, and held that the original administrative claims did not fairly raise the estate's claims. That fact-specific determination lacks any general importance that would warrant review by this Court, and was in any event correct. The July 1998 claims omit any demand on behalf of the estate or for damages to Haceesa himself (*id.* at 1.65 to 1.66, 1.69); the October 1998 claims include both (*id.* at 1.73). Haceesa's counsel knew, as did the agency, that this difference had a legal effect, which is presumably why counsel filed a separate claim for the estate. Cf. *McNeil*, 508 U.S. at 113 (reasoning that "the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent").[4]

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[4] Petitioners say that the Sixth and Seventh Circuits would have held that the July 1998 administrative claims fairly raised the claims of the estates, relying on *Knapp* v. *United States*, 844 F.2d 376 (6th Cir. 1988), and *Murrey* v. *United States*, 73 F.3d 1448 (7th Cir. 1996). *Knapp* addressed the distinct question whether the fact that a decedent's spouse had not been formally certified as personal representative of her husband's estate when she filed her administrative claim—though she filed a claim that on its face clearly asserted the estate's rights so as to satisfy 28 U.S.C.

b. Petitioners finally argue that because "the United States expressly agreed to amendment of Plaintiffs' Complaint prior to the expiration of the six (6) month period in question," the decision conflicts with *Kelley* v. *United States*, 568 F.2d 259 (2d Cir. 1978). Pet. 23-24. There is no conflict. In *Kelley*, the Second Circuit held that a plaintiff who did not know that the defendant was a federal employee and filed suit in state court could avoid dismissal after removal to federal court despite failing to file an administrative claim within the statutory deadlines.[5] The current case does not involve this question of interaction between the FTCA's exaustion provisions and its removal provisions; counsel for petitioners knew that they were dealing with the federal government and knew that they were subject to the FTCA's procedures.

In this case, as the court of appeals explained, the government informed petitioners that it would not oppose an amendment to include the estate's claims, but

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2675(a)—deprived the district court of jurisdiction. 844 F.2d at 377, 380. *Murrey* involved a different theory of recovery for the same damages to the same party, 73 F.3d at 1452, and can be distinguished on that ground alone. In any event, *Murrey* focused on what would appear to a "legally sophisticated reader," *id.* at 1453, and in this case, a legally sophisticated reader would have inferred from the July 1998 administrative claims not that the demand of the estate was implicitly presented there, but instead that any such demands would be raised in a separate filing, as indeed they were. Neither case establishes a split among the circuits.

[5] The 1988 amendments to the FTCA, which protect the plaintiff who has no knowledge of the federal presence in a case, address the Second Circuit's concerns in *Kelley*. See 28 U.S.C. 2679(d)(5) (as amended by Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563).

did not believe that this could be done by interlineation. Pet. App. 1.22.[6] The United States took that position before the expiration of the six-month period mandated by 28 U.S.C. 2401(b). As the court of appeals noted, "[g]overnment counsel did nothing wrong." Pet. App. 1.22. Accordingly, the petitioners' statement that "[t]he United States must not be encouraged to continue to act in the manner demonstrated here" (Pet. 26) lacks any foundation in the record of this case and provides no basis for this Court's review.

The result in this case is undeniably severe in that it reduces petitioners' claims against the United States to considerably less than New Mexico's statutory cap.[7] That result, however, was contemplated by Congress's enactment of Sections 2401 and 2675; and by this Court's conclusion in *McNeil* that "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command" requiring exhaustion, 508 U.S. at 112. The faithful application of those mandates by the court of appeals does not warrant review by this Court.

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[6] Nothing in the record suggests that counsel for the United States took that position in bad faith or for the purpose of delay. The district court agreed with the position of the United States on this admittedly minor procedural point, requiring petitioners to "submit a fully amended complaint." Pet. App. 1.32.

[7] Petitioners (including the estate) retain claims against San Juan Hospital and the physicians employed there, which count towards the total recovery permitted by the cap. Petitioners have filed at least three such actions and settled one. *Haceesa* v. *San Juan Reg'l Med. Ctr.*, No. 99cv00193 (D.N.M. filed Feb. 25, 1999), dismissed by stipulation (Oct. 13, 2000); *First Fin. Trust Co. ex rel. Haceesa* v. *San Juan Reg'l Med. Ctr.*, No. D-202-CV-9811986 (N.M. 2d Dist. filed Dec. 15, 1998, stayed Sept. 19, 2001); *First Fin. Trust Co. ex rel. Haceesa* v. *Patel*, CV-200102842 (N.M. 2d Dist. filed Apr. 23, 2001, stayed June 4, 2002).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

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